IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 249.

WYATT TEE WALKER, MARTIN LUTHER KING, JR., RALPH ABERNATHY, A. D. KING, J. W. HAYES, T. L. FISHER, F. L. SHUTTLESWORTH and J. T. PORTER,
Petitioners,

vs.

CITY OF BIRMINGHAM, a Municipal Corporation of the State of Alabama,
Respondent.

On Writ of Certiorari to the Supreme Court of Alabama.

BRIEF FOR RESPONDENT.

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INDEX.

AUTHORITIES CITED.

Cases:

Statutes:

Rules:

Miscellaneous:

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PRELIMINARY STATEMENT CONCERNING "QUESTIONS PRESENTED" AS STATED BY PETITIONERS.

We think the "Questions Presented" by petitioners are couched in language that fails to take into account the full scope of the unlawful activity charged in the bill of complaint and the activity prohibited by the injunction,

violation of which was charged in the contempt petition and for which petitioners were convicted. Specifically, the resolution of the problem into that of whether or not the Birmingham Ordinance 1159 is unconstitutionally vague or that the injunction must necessarily be tested by the constitutionality of such ordinance, or that such injunction or the ordinance is over broad and vague as a censorial regulation of free speech as stated in (1) and (2) its several subsections and (3), we think too narrowly defines the issues, which must take into account the full nature and extent of the unlawful conduct imminently threatening the safety of lives and property of citizens of Birmingham complained of in the bill of complaint and enjoined and charged in the contempt petition rather than to confine them solely to the mere question of whether a peaceful, lawful parade or procession is converted into an illegal act simply by the fact that no permit was ever obtained to stage such assumedly peaceful, lawful parade.

The approach taken by petitioners with respect to the above, and also as to (4), which attempts to isolate the defiant statements and news release of petitioners, M. L. King, Jr., Abernathy, Walker and Shuttlesworth from its place in the chain of events in consummation of the conspiracy which brought about and culminated in the commandeering of the public streets of Birmingham by a throng of some fifteen hundred to two thousand Negroes, occupying the entire width of the pavement and extending over both sidewalks for a destination which its leaders wilfully refused to disclose to law enforcement officers and which formed a howling, violent, rock throwing mob, inflicting personal injury and damage to property overlooks the conviction of all eight petitioners for conspiracy to violate the injunction.

As to (5) the issue presented by petitioners leaves out of account relevant matters.

It is also to be noted that 2 (c) does not appear to be included in the Questions Presented in the Petition for Writ of Certiorari.[1]

We, therefore, respectfully restate the questions persented as we conceive them to be.

QUESTIONS PRESENTED.

I.

Whether the State Supreme Court properly invoked the doctrine that a court of general jurisdiction having full jurisdiction over the parties and with equity jurisdiction to grant injunctions, and having done so in a controversy over which it had jurisdiction to examine into and make a final determination, may punish one in criminal contempt who wilfully, flagrantly, intentionally flouted and defiantly violated such injunction without making any effort to dissolve or discharge such injunction in orderly process of law.

II.

Whether in a collateral certiorari proceeding one who, without resorting to the lawful means available to test the authority of such court, has arrogated unto himself the right to contemptuously defy its order, and in the same defiance has openly avowed his intent to violate it and all other laws which he may decide are unjust, may nevertheless be entitled by petition for certiorari to reverse his conviction for criminal contempt rendered in a proceeding in which he has been granted a full hearing, with no failure to comply with procedural requirements: on the alleged invalidity of the injunction for vagueness; on the alleged invalidity of Sec. 1159 of the City Code of

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[1] This is in conflict with Supreme Court Rule 40 1.d (2).

Birmingham; on account of alleged exclusion of evidence; and on account of the alleged failure of evidence to show a violation of a particular one of the many prohibitions of the injunction, such particular prohibition which he denies having violated having been selected from the many by petitioner himself?

III.

Whether one, referred to in II above, and IV below, who has been convicted for criminal contempt for participating in a conspiracy to violate an injunction where the conspiracy has been successful and the injunction violated in at least one of its prohibitions, especially in commandeering and unlawfully taking over the streets and sidewalks of the City by a horde which formed a violent mob, and where the sentence is the same for each of the convicted conspirators, may attack the conviction by isolating the act or acts done by such conspirator from its or their place in furtherance of the consummation of the conspiracy and apply constitutional claims of violation of freedom of speech and assembly, equal protection of the laws and lack of due process to the separate acts so as to reverse his conviction if any of such acts in the chain so separately treated is vulnerable to such constitutional attack?

IV.

Whether one who is a member of, or a member and also an officer in and leader of an organization, Southern Christian Leadership Conference (S. C. L. C.), or of its affiliate organization, Alabama Christian Movement for Human Rights (A. C. M. H. R.), against both of whom, their members and leaders, an injunction has been issued, and who is charged in the petition for rule nisi with conspiring with other members or leaders to defy and

violate the injunction by a series of declarations and acts, may, after conviction for a single offense, isolate such declarations from such acts in consummation of the conspiracy, and claim for such declarations the constitutional immunity of free speech with effect of reversing the contempt conviction on certiorari proceedings?

V.

Whether or not two particular members of such organization (A. C. M. H. R.), J. W. Hayes and T. L. Fisher, both of whom attended, and one of whom (Hayes) appeared on its program on Saturday night, April 13th, when solicitation for and plans were made to congregate such unruly violent mob on Easter Sunday, April 14th, and both of whom having admitted knowing about the injunction and were aware that those participating in such event on April 14th would likely be arrested, and as to one of them (Hayes) an admission that he did so in the face of the injunction, are entitled to reversal of their convictions for want of proof of intent to violate the injunction with notice or knowledge of its terms?

ALABAMA CONSTITUTION, STATUTES, AND BIRMINGHAM ORDINANCES INVOLVED.

STATEMENT.

We feel some important parts of the Record have been omitted from petitioners' statement.

A. The Verified Injunction Bill.

The verified bill of complaint for injunction, temporary and permanent, was filed April 10, 1963. In paragraph 3, it alleges that on numerous dates in April, 1963, respondents

> "sponsored and/or participated in and/or conspired to commit and/or to encourage and/or to participate in certain movements, plans or projects commonly called 'sit-in' demonstrations, 'kneel-in' demonstrations, mass street parades, trespasses on private property after being warned to leave the premises by the owners of said property, congregating in mobs upon the public streets and other public places, unlawfully picketing private places of business in the City of Birmingham, Alabama; violation of numerous ordinances and statutes of the City of Birmingham and State of Alabama; that the said conduct, actions and conspiracies of the said respondents in the City of Birmingham is such conduct as is calculated to provoke breaches of the peace in the City of Birmingham; that such conduct, conspiracies and actions of said respondents as aforesaid threatens the safety (fol. 71), peace and tranquility of the City of Birmingham" (R. 31, 32).

Such paragraph 3 continues with allegations that such conspiracies and actions have already caused or resulted in serious breaches of the peace and respondents threaten to continue such unlawful conduct unless respondents are enjoined[2] (R. 31, 32).

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[2] "Such conduct, conspiracies and actions aforesaid have already caused or resulted in serious breaches of the peace and

Paragraph 4 and its subsections outline specific instances of unlawful conduct. Some of these incidents relate to trespass upon private property,[3] parading without a permit on April 6th, 8th and 10th (R. 33). Subsection (c) does not charge parading without a permit but alleges that on April 7th, 1963, respondents organized a parade or procession to march upon the City Hall and incident thereto,

> "did further foster, encourage and cause a mob consisting of approximately 700 to 1,000 Negroes to congregate upon the public streets of the City of Birmingham, blocking and interfering with traffic, such mob having been gathered to encourage the said intended march on City Hall of the City of Birmingham from a point several blocks from said City Hall, which said mob became unruly, a number of such mob blocked the sidewalks of the City of Birmingham and a large number refused to obey the lawful orders of officers of the Police Department of the City of Birmingham in their efforts to disperse said unruly mob" (R. 33, 34).

It is also alleged that the great throng caused to be congregated around the City Hall in connection with such

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violations of and disregard and contempt for the law in numerous specific instances hereinafter set forth and complainant avers that said respondents, separately and severally, threaten to continue to sponsor, foment, encourage, incite, to be committed or to commit further breaches of the peace and acts and conduct which are in violation of and disregard for the law unless respondents are enjoined therefrom" (R. p. 32).

[3] This bill of complaint was filed and the injunction issued and contempt charges heard and the petitioners convicted on April 26, 1963. **Gober v. Birmingham**, 373 U. S. 374, 83 Sup. Ct. 1311 (May 20, 1963) and similar cases from other states were decided after the contempt conviction. **Peterson v. City of Greenville**, 373 U. S. 244, 83 Sup. Ct. 1119 (May 20, 1963); **Avent v. North Carolina**, 373 U. S. 375, 83 S. Ct. 1311 (May 20, 1963); **Lombard v. Louisiana**, 373 U. S. 267, 83 Sup. Ct. 1122.

proposed march required "the blocking off of several streets in the City of Birmingham to prevent breaches of the peace and violence, including mob violence" (R. 34).

It is alleged in paragraph 5 that the acts alleged in the two preceding paragraphs have placed an undue strain upon the manpower of the Police Department of the City of Birmingham in the effort to provide for the safety of the respondents in said conduct and activities upon the public streets and public places in said City and to provide for the safety and tranquility of the entire citizenship and will cause damage to city property and injury or loss of life to police officers (R. 34).

In paragraphs six and seven, a conspiracy of respondents and others to continue such actions and conduct to the imminent danger to lives, safety, peace and tranquility of the people of Birmingham unless enjoined is alleged[4] (R. 34, 35). A threat to conduct "Kneel-Ins" is alleged in paragraph 8 (R. 35). In said paragraph 8, it is alleged upon information and belief that the acts and conduct

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[4] Said paragraphs read as follows:

"6. Your complainant is informed and believes and upon such information and belief avers that respondents, separately and severally, and others acting in concert with respondents, whose exact names and entities are otherwise unknown to your complainant at this time will continue to enter into the City of Birmingham conducting themselves as above described, which will lead to further imminent danger to the lives, safety, peace, tranquility and general welfare of the people of the City of Birmingham, Jefferson County, and the State of Alabama, and that tension will continue to mount as such activities are continued.

7. Your complainant is informed and believes and upon such information and belief avers that there is strong and convincing reason to believe that respondents and others acting in concert with respondents, whose names are otherwise unknown to your complainant, have and will continue to conspire to engage in unlawful acts and conduct as aforesaid unless enjoined from so doing" (R. 34, 35).

of respondents "is a part of a massive effort by respondents and those allied or in sympathy with them to **forcibly** integrate all business establishments, churches, and other institutions of the City of Birmingham" (R. 35).

Allegations of irreparable injury are contained in paragraph 9[5] (R. 35).

The prayer for injunction is to restrain the parties, their agents and servants, followers and those in active concert with them and persons having notice of said order from continuing any acts **hereinabove** designated, particularly: I, engaging in, sponsoring, inciting or encouraging (1) mass street parades, processions or like demonstrations without a permit; (2) trespasses after warning upon private property; (3) congregating upon the streets or public places into mobs, and (4) unlawfully picketing business establishments or public buildings or performing acts calculated to cause breaches of the peace; or II, conspiring to engage in: (1) unlawful street parades; (2) unlawful processions; (3) unlawful demonstrations; (4) unlawful boycotts; (5) unlawful trespasses and unlawful picketing or other like unlawful act or from violating the ordinances of Birmingham and statutes of Alabama; or III, from doing any acts designed to consummate conspiracies to engage in said unlawful acts of (1) parading, (2) demonstrating, (3) boycotting, (4) trespassing, and (5) picketing, (6) or other unlawful acts; or IV, from engaging in acts and conduct customarily known as "Kneel-Ins" in churches in violation of the

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[5] Said paragraph reads: "9. Complainant avers that its remedy by law is inadequate, that the continued and repeated acts of respondents, as herein alleged, will cause incidents of violence and blood- (fol. 74) shed; that complainant has no other adequate remedy to prevent irreparable injury to persons and property in the City of Birmingham, Jefferson County, and verily believes that such will occur if such respondents continue to so conduct themselves which they will do if not restrained by this Court."

wishes and desires of the members of said churches[6] (R. 40).

The temporary injunction writ issued in language identical with the prayer of the bill (R. 43-45).

B. **The Petition for Rule Nisi.**

The criminal contempt action was initiated by a petition for rule nisi duly served upon all the respondents. Such petition contained allegations charging the defiance of the injunction and intention to disobey issued by the Circuit Court of Alabama both in and prior to the press conference held during the day of April 11th and in other statements at meetings of the respondent, Alabama Christian Movement for Human Rights on April 11th, 12th and 13th by petitioners, Martin Luther King, Jr., Abernathy, Shuttlesworth, Walker, A. D. King (Paragraphs 6, 7, 8 and 9—R. 85-86).

It is alleged in paragraph 7 that respondents, Abernathy, Shuttlesworth and A. D. King announced at the meeting on April 11th they would participate in an unlawful march or procession on April 12th and would go to jail and solicited volunteers to engage in it. One or more of said respondents openly boasted the injunction had been violated that day (R. 85-86).

It is averred that at the April 12th meeting volunteers were solicited to engage in unlawful processions, parades and other unlawful activities; that respondent, Wyatt Tee Walker, solicited volunteers to go to jail and also about a dozen or two volunteers to die for the cause (Par. 8—R. 36).

At the meeting on Saturday night, April 13th, respondent Walker called for volunteers to engage in an unlawful

[6] Division of the prayer for injunction into numbered parts is supplied in this brief for purpose of convenience and did not appear in the original bill.

procession in violation of the injunction and to go to jail. A call was also made for children, ages from the first grade up. Also a call was made for volunteers to call all other Negroes to assemble as many Negroes as possible at the time of the procession or march on Easter Sunday, April 14th (Par. 9, R. 86, 89).

Specific overt acts in consummation of the conspiracy and in violation of the injunction are alleged in paragraph 10 and its subparts (R. 87, 88). Paragraph 10 (B) relates to the April 12th march or procession in which Petitioners Martin Luther King, Jr., Abernathy and Shuttlesworth were direct participants (R. 87).

Allegations setting forth the gathering of the violent mob on Sunday, April 14th, as a part of said conspiracy are contained in paragraph 10-D.[7] Direct participants were respondents, A. D. King, Jr., J. W. Hayes, John Thomas Porter and T. L. Fisher. All but said Fisher

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[7] "D. On Easter Sunday afternoon, in response to the said solicitations made at said meeting on Saturday night, April 13th, as hereinabove alleged and as a part of said conspiracy and concert of action, an unruly mob of chanting, dancing, hopping Negroes consisting of several thousand assembled in and around Thurgood C. M. E. Church at 11th Street and 7th Avenue, North. An unlawful procession consisting of several hundred Negroes formed at said church and proceeded to parade or march upon the public sidewalks and streets of the City of Birmingham without a permit, unlawfully and in violation of City Ordinance and in violation of said injunction. Said unruly mob followed along side, behind and in front of said procession and persons forming a part of said mob threw rocks, brickbats or other dangerous objects at members of the Police Department of the City of Birmingham engaged in arresting said members of said procession. A motor vehicle of the Police Department was struck by a rock or brickbat or other hard object and was seriously damaged. Mr. James Ware, a newspaper photographer employed by Birmingham Post-Herald, was struck and injured by a rock or other dangerous object. Other persons, including police officers, were narrowly missed by said rocks or other dangerous objects which were thrown on said occasion. One (fol. 125) officer of the said Police Department was injured by one of said paraders or marchers resisting arrest in the tense atmosphere created by said mob" (R. 88).

were parties respondent and had been served with said injunction prior thereto. The latter is alleged to have participated with knowledge (Par. 11, R. 89).

C. **Evidence.**

Recruitment to Die and to Go to Jail.

At every meeting on April 12th, 13th and 14th, people willing to go to jail were recruited, but at the meeting on April 11th, petitioner Wyatt Tee Walker said "he was looking for two dozen Negroes who are willing to die for me!" This testimony was given by Mr. J. Walter Johnson, Jr., a reporter for the Associated Press, who attended all of the meetings, April 12th through April 14th (Pet. Br. 7) and was testifying from his notes made at the meetings (R. 202, 203, cross. 204).

On the question of recruitment to go to jail, Petitioner Abernathy was upset because Al Hibler, the Negro blind singer who led a march on Wednesday and Thursday and was not arrested (R. 189). He said, "That is discrimination and we don't like it." In other words that Hibler was discriminated against because he was not arrested (R. 190).

Dr. King said Ralph Abernathy and he were to follow Hibler on Thursday but because he was not arrested on Wednesday "they gave him another opportunity on Thursday and they would wait until Good Friday" (R. 189, 190).

Also at this meeting note was taken of some who had just gotten out of jail. They were introduced to the meeting by Rev. Young (R. 201, 202).

Recruitment of Participants in Marches.

Volunteers were enlisted to participate in the marches (J. Walter Johnson, Jr., R. 193; Elvin Stanton, R. 245;

Petitioner T. L. Fisher, R. 301; Petitioner J. W. Hayes, R. 333, 334). Petitioner Wyatt Tee Walker made a call at the meeting on April 12th for students of Birmingham, Grade 1 through graduate school, to meet Saturday morning, April 13th. He said: "There is something we want to do with the student population of Birmingham. They can get a better education in five days in this jail than five months in school" (R. 202). At the meeting on Saturday night, April 13th, a call was made for volunteers who would call all the Negroes in the community and get them out the next day, Sunday, April 14th (Rev. T. L. Fisher, R. 301, 302).

Secrecy as to Destination of Marches.

No evidence was offered of any effort to get a permit relating to any march, procession or demonstration charged in the rule nisi petition. The Court made it clear that evidence of any effort made to get a permit for any incident charged in such petition as a violation would be relevant (R. 286, top of page). No such evidence was ever offered, although it does appear that the head of the Alabama Christian Movement, Rev. F. L. Shuttlesworth, had been informed as early as April 5th of the proper way to make an application for such a permit (R. 285, Statement of Counsel for City).

Not only was there a failure to apply for a permit but there was a failure or refusal to furnish accurate information as to the time, route and destination. The information picked up by the Police Department on these matters was imprecise and inaccurate. Word had been received from some source, possibly the press (R. 165) that the demonstrations on April 12th and April 14th would either be on City Hall or City Jail (Inspector Haley, R. 146 as to the 12th; Lieutenant Painter as to the 14th, R. 215). Rev. N. H. Smith and Rev. J. W. Hayes, both of whom were robed participants in the April 14th march,

testified they did not know where the march was scheduled to go (R. 315, 316, 338). On the afternoon of April 14th, Lieutenant Painter questioned petitioner Wyatt Tee Walker as to whether the destination was City Hall or City Jail or neither (R. 215). Some information appears to have come from petitioner Walker relating to April 12th, but this related to a march which was supposed to come at 12:00 Noon or 12:15 (R. 180).

No Distinction Between Marchers and Accompanying Crowds.

A large crowd gathered at a church on 6th Avenue, North, at 16th Street. The march led by petitioners, Martin Luther King, Jr., Abernathy and Shuttlesworth, came out of the church but the crowd outside joined with them. Lieutenant Painter testified, "As the group came out of the church then the whole group of people who had assembled along the sidewalk followed along behind them and I think you could describe it as one procession" (R. 207). This related to the march held on April 12th after 2:45 P. M. (R. 149, 206, 207).

Concerning the April 14th incident, the same witness testified that as the marchers came out of the church and started walking at a rapid pace, "almost simultaneously as if with the same movement, or I will say simultaneously, this large crowd that had gathered outside began moving along with them . . . covering, basically all the area of the street and sidewalk" (R. 215). When Nelson Henry Smith, Jr., one of the defendants on trial, was asked on cross-examination whether anyone on the outside of the church joined the some five or six hundred as they came out of the church, he testified: "Well, everybody was just going walking in the same direction" (R. 315). Inspector Haley said that after the Easter Sunday march started: "They did block the street. That is between 11th Street and 7th Avenue up to 5th Alley and

11th Street. The street was solid, and the sidewalks were solid with marchers" (R. 155). He described it as a solid mass, filling the streets and sidewalks (R. 156, 157). Complainants Exhibits 3, 4, 5 and 6, referred to by the Alabama Supreme Court in its opinion (R. 436, bottom of page) graphically depict the scene as photographed by Mr. James Ware, Newspaper Photographer. These exhibits appear on pages 411-414 of the record. They were identified, described and introduced (R. 359, 360). Exhibit 3 was taken within a block and a half of the church from whence it started, the church appearing in the picture on the right is not the church of origin (R. 360). Exhibit 4 shows police officers in the foreground and the marchers in the background.

Marchers and Crowd Were One and Under a Single Command.

Lieutenant Painter testified that on April 12th petitioner Wyatt Tee Walker, speaking and signalling to the crowd, told them to circle the block one time. This was after the police officers encountered difficulty in getting the crowd to scatter (R. 208, 209). As to the April 14th incident, Rev. Wyatt Tee Walker, upon being told that by Painter the concern of law enforcement officers in being informed of the time and destination of the march "was in the interest of controlling the crowds and law enforcement", to which "he replied . . . 'If you control yourself and the police as well as I control this crowd, there won't be any problem. I guarantee you I can control these people'" (R. 215).

Police Succeeded in Avoiding a Serious Racial Conflict.

On both instances the police officers blocked the immediate area where the crowds were congregating both to white pedestrians and vehicular traffic as a necessary pre-

caution to prevent a conflict with white racial agitators and because of the traffic hazard created (R. 154, 170, 174). From the experience of the "Freedom Rider" incident when outside agitators assaulted and beat the demonstrators, Inspector Haley was of the opinion that the demonstrations then in progress were likely to attract these trouble makers from out of Jefferson County with a serious racial conflict resulting (R. 174). Inspector Haley testified that these precautions succeeded in keeping down an undue amount of violence and strife and trouble away from the City, and prevented racial conflict between Negroes and whites (R. 185). To this extent by hard effort, the Police Department had maintained law and order (R. 182, 184) and had succeeded in their purpose to protect the demonstrators (R. 161). This was made more difficult by the refusal of the leaders to furnish accurate information to the Police Department (R. 170).

Movement Psychology of Violence.

On cross-examination, Lieutenant Willie B. Painter testified as to the nonviolent methods of the two organizations involved. "The teachings have been nonviolent. The psychology and methods used have been to incite others to create violence upon the participants in demonstrations". He also said, "There has been a complete program within the last year or eighteen months of teaching hatred of the white people, that they are your enemies. They were teaching nonviolence on the one hand, but on the other hand they were saying that the Negroes in Birmingham, Alabama, are buying fire arms to protect themselves. They were supposedly teaching nonviolence but yet psychologically they were advocating violence" (R. 220).

At the time of the defiant news release on the morning of April 11th, Petitioner Shuttlesworth also used a separate paper and made some comments in which he said:

"If the police couldn't handle it, the mob would" (R. 250).

Also in talking to Lieutenant Painter, Petitioner Walker said if the Movement "did not obtain the things that we are seeking, then we will follow the course of revolution to obtain these things"[8] (R. 213).

The Crowds Assembled Became Unruly, Belligerent and Violent.

Inspector Haley was asked whether the crowds on both occasions became unruly, to which he replied: "Yes, and belligerent. We did not make as many arrests as we could have if we had just faced the crowd, but we had other work to perform" (R. 172). Inspector Haley also testified: "There was violence in that one or more officers and a newspaper man had been injured and City property destroyed, during these incidents" (R. 182). Other evidence of violence, especially on the occasion of April 14th is detailed by the Supreme Court of Alabama (R. 436). That court made specific reference to the testimony of witnesses Painter (R. 216) and Ware (R. 231-233). Its opinion also referred to the testimony of Painter that petitioner Wyatt Tee Walker had formed the crowd outside into a group that joined the April 14th march (R. 214, 215).

D. **Treatment by Lower Courts.**

The Circuit Court made clear at the outset before the hearing began the issue he considered presented by the contempt citation on the question of jurisdiction was whether the court was an equity court and issued the injunction in a case in which the Court had jurisdiction over the parties. There remained only the question of

[8] This statement was in a context of a discussion to the effect that 2% of the people in Russia succeeded in overthrowing the government (R. 212, 213).

their having violated the injunction knowingly; that some motion should have been filed so that the court could determine whether or not it had properly issued the injunction before it was violated (R. 140).

In its opinion this court clearly limited the convictions to criminal contempt for past conduct (R. 420). The Court also commented on the absence of any evidence that any effort had been made to comply with the requirements of the permit ordinance. In its opinion the court said:

> "The legal and orderly processes of the court would require the defendants to attack the unreasonable denial of such permit by the Commission of the City of Birmingham through means of a motion to dissolve the injunction at which time this Court would have the opportunity to pass upon the question of whether or not a compliance with the ordinance was attempted and whether or not an arbitrary and capricious denial of such request was made by the Commission of the City of Birmingham. Since this course of conduct was not sought by the defendants, the Court is of the opinion that the validity of its injunction order stands upon its prima facie authority to execute the same" (R. 422).

This court also concluded these petitioners were guilty of a conspiracy, that is concerted efforts to personally violate the injunction and encourage and incite others to do so.[9]

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[9] The pertinent language of the court concerning all defendants except defendants Gardner, C. Woods, A. Woods, Jr. and Palmer, as to whom motion to exclude the evidence was granted is as follows: "Under all the evidence in the case, the Court is convinced beyond a reasonable doubt that the remaining defendants had actual notice of the existence of the prohibitions, as contained in the injunction, and of the existence of the order itself; and that the actions of all the remaining defendants were, in the opinion of this Court, obvious acts of contempt, constituting deliberate and blatant denials of the authority of

This Court also relied upon and cited **United States v. United Mine Workers of America,** 330 U. S. 308 (concurring opinion of Mr. Justice Frankfurter).

The Alabama Supreme Court, in reliance upon the same **Mine Workers** case (330 U. S. 258, 290-295), and **Howat v. Kansas,** 258 U. S. 181, and citing the concurring opinion of Mr. Justice Harlan in **In Re Green,** 369 U. S. 689, 693 (R. 440-442) decided the case as one in criminal contempt only and upon the proposition that it is the duty of one to obey an injunction, even if it should be based upon enforcement of an invalid ordinance, until he takes appropriate legal steps to accomplish its discharge or dissolution.

The Alabama Supreme Court determined the jurisdictional right of the Circuit Court to issue injunctions under Sec. 144, Constitution of Alabama, and Secs. 1038 and 1039, Code of Alabama, 1940 (R. 439), but did not explore the constitutionality of Sec. 1159. It found there were no procedural defects in the proceeding, except as to three respondents, as to whom the Court felt there was insufficient evidence to show a violation of the injunction with notice of its terms"[10] (R. 446, 447).

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this Court and its order and were concerted efforts to both personally violate the said injunctive order and to use the persuasive efforts of their positions as ministers to encourage and incite others to do likewise". (R. 422).

[10] The three as to whom convictions were quashed were Andrew Young, James Bevil, and N. H. Smith, Jr.

SUMMARY OF ARGUMENT.

I.

The Supreme Court of Alabama, in the opinion under review, had on certiorari reviewed the decision of the Circuit Court from the criminal contempt convictions on a record which that Court concluded shows wilful contempt on the part of petitioners after service upon them of the bill of complaint and writ of injunction, with the exception of petitioners Hayes and Fisher, both of whom were parties but had not been served but as to whom the Court concluded they violated the injunction with notice. It is submitted that court properly held the issue of the constitutionality of Ordinance 1159, Parading Without a Permit, was not presented for review on certiorari from the Circuit Court which had jurisdiction to issue the injunction because it was a court of equity, had jurisdiction of the parties and no effort was made to modify or dissolve such injunction prior to its violation, there being no question of procedural defects in the contempt proceedings, no contention appearing in the record that after the injunction was issued any effort was made to request a permit or otherwise attempt to comply with the injunction insofar as it banned parading without a permit as required by such ordinance. Such conclusion of the Alabama Supreme Court rested on an adequate state ground, that is, that on certiorari from a criminal contempt conviction in such case the Court will not consider the merits of the injunction, even if it rested upon an ordinance or statute found to be unconstitutional, a doctrine accepted by state and federal courts alike. **Howat v. Kansas**, 258 U. S. 181, 42 S. Ct. 277; **United States v. United Mine Workers**, 330 U. S. 258; **In Re Green**, concurring opinion of Mr. Justice Harlan, 369 U. S. 689, 693; **Ex Parte Hacker**, 250 Ala. 64, 33 So. 2d 324; **Hotel and Restaurant Employees, etc. v. Greenwood**, 249 Ala. 265, 30 So. 2d 696, Cert. Den. 322 U. S. 847, 68 S. Ct. 349.

A. The Alabama Circuit Court at least had jurisdiction to determine its own jurisdiction and wilful violation of its injunctive decree is punishable as criminal contempt even if the court ultimately is determined to have no jurisdiction. **Shipp v. United States**, 1906, 203 U. S. 563, 27 S. Ct. 165, 51 L. Ed. 319, 8 Ann. Cas. 265; **Howat v. Kansas**, 1922, 258 U. S. 181, 42 S. Ct. 277, 66 L. Ed. 550; **Carter v. United States**, 1943, 5th Cir., 135 Fed. 2d 858; **In re Williams**, 26 Pa. 9, 67 Am. Dec. 374; **Sima Piano Company v. Fairfield**, 103 Wash. 206, 174 Pac. 457.

Reid v. Independent Union A. W., 200 Minn. 599, 271 N. W. 300, 120 ALR 297; **Main Cleaners & Dyers v. Columbia Super Cleaners**, 332 Pa. 71, 2 A. 2d 700; See also **Stoll v. Gottlieb**, 305 U. S. 165, 171, 172, 59 Sup. Ct. 134, 83 L. Ed. 104, 108, 109; 38 Am. Banks, U. S. 79; cf.—**Jones v. Securities and Exchange Comm.**, 298 U. S. 1, 56 Sup. Ct. 654, 80 L. Ed. 1015, 1021, 1022.

The orderly and legal way to have tested the Alabama Circuit Court temporary injunction was to file a motion to dissolve which could have raised the question of the court's authority and all constitutional or other questions relating to the temporary injunction as petitioners knew and mentioned in their news release, an appeal from a ruling on which motion lies to the Supreme Court as a preferred case. **Alabama Supreme Court Rule 47** (Appendix, pages 76-77). The principal petitioners knew and mentioned on the day they received service of the injunction the proper way to attack it was to move its dissolution. They also said they would violate the injunction regardless and made no effort to comply and stated they would do so and risk the possible consequences involved.

B. The rule applies even if constitutional freedoms are involved in complying with the injunction, since the Court will not consider the merits of the main case in the collateral matter of contempt, as the motion to dissolve the

injunction in a direct proceeding is the only remedy unless the issuing court is totally without jurisdiction to issue the injunction. **Howat v. Kansas**, 258 U. S. 181, 42 Sup. Ct. 277; **Schwartz v. United States**, 1914 (C. C. A. 4), 217 Fed. Rep. 866; **Allen v. United States**, 1922 (C. C. A. 7), 278 Fed. 429; **Clarke v. Fed. Trades Comm.**, 128 Fed. 2d 542; **United States v. United Mine Workers**, 330 U. S. 258, supra; **Ex parte Hacker**, 250 Ala. 64, 33 So. 2d 324; **Hotel and Restaurant Employees, etc. v. Greenwood**, 249 Ala. 265, 30 So. 2d 696, cert. den. 322 U. S. 847, 68 S. Ct. 349; cf. **United States v. Debs**, C. C. Ill., 64 Fed. 724, error denied, **In Re Debs**, 159 U. S. 251, 15 S. Ct. 1039; cf. **In Re: Debs**, 158 U. S. 564, 15 S. Ct. 900.

C. Any argument, regardless of how plausible and alluring it may sound, which has at its underlying roots the doctrine that any citizen is entitled to wilfully violate an injunction issued against him without making any effort to comply with it, or as to that matter wilfully violate any law applicable to him simply because he does not feel it is just as to him, without having recourse to remedies duly provided by the law is untenable because the ultimate and inexorable end result is chaos and anarchy. **Gompers v. Bucks Stove & Range Co.**, 1911, 221 U. S. 418, 450, 31 Sup. Ct. 492, 501, 55 L. Ed. 797, 34 L. R. A. (U. S.) 874; **United States v. United Mine Workers of America**, 1947 (Mr. Justice Frankfurter concurring), 330 U. S. 258, 307, 308, 309, 67 Sup. Ct. 677, 703; **Cox v. State of Louisiana**, 1965, 379 U. S. 536, 554, 85 S. Ct. 453, 464, dissenting opinion of Mr. Justice Black, 379 U. S. at pages 583, 584. The record in this case compels the conclusion that petitioners in this case, and especially those who openly declared their intentions to violate the injunction had the uttermost contempt for the court and the injunction and made no effort whatever to comply with it but to the contrary exploited its intentional violation as a vehicle to obtain nationwide publicity in press, radio and TV.

In Re: Debs, 1895, 158 U. S. 564, 15 S. Ct. 900; **United States v. Barnett**, 1964, 376 U. S. 681, 697, 84 S. Ct. 984, 993.

Submission under this Section I is that the contempt convictions of petitioners should be sustained as against the several constitutional grounds asserted in opposing briefs, treating the convictions as having been solely based upon a violation of ordinance 1159, without considering the constitutionality thereof because of the failure of petitioners to present such constitutional contentions by motion to dissolve prior to wilfully violating the injunction. It is assumed arguendo that no enjoinable conduct other than simply failure to obtain a parade permit is involved.

The primary basis is the rule of **Mine Workers** and **Howat v. Kansas**, which we urge be left unchanged.

II.

The criminal contempt convictions of petitioners are not erroneous and subject to reversal on account of the contentions made in briefs for petitioners and the United States, as amicus curiae that there was lack of due process or failure to afford equal protection of the laws or a violation of the freedom of speech or assembly provisions of the First and Fourteenth Amendments.

A. Aside from any consideration of ordinance 1159, as a support for the injunction, the conduct of petitioners shown by the record discloses a conspiracy to violate the injunction in the news conference, repeated meetings of the "movement" resulting in the march on April 12th and culminating in the assembly of the mob and the march or procession of April 14th, when correct information as to time, route and destination were not only not furnished police authorities, but such information wilfully withheld, and where the entire street and both sidewalks were preempted and commandeered by the procession or march-

ers and whose destination whether to City Hall, Northeast or City Jail, Southwest of the starting place, was shrouded in secrecy and which formed an unruly, belligerent, howling, cursing mob, gathered by and controlled by petitioners and those in concert of action with them, is conduct which cannot under any circumstances qualify as constitutionally protected.

B. The First and Fourteenth Amendments do not confer absolute right to patrol, march, picket or otherwise use the streets as means of communicating ideas. Such rights are subject to the concommitant right and duty of the City to control the use of the streets for the common use and welfare of the public. **Cox v. Louisiana**, 1965, 379 U. S. 536, 554, 558, 85 S. Ct. 453, 464, 468. The existence of the injunction in part rested upon ordinance 1159, which assuming arguendo to be unconstitutional and that such part of said injunction is therefore void, do not confer any rights upon petitioners to engage in nonconstitutionality protected acts described in A, above, and which are otherwise validly prohibited by the injunction. **Liquor Control Commisison v. McGillis**, 1937, 91 Utah 586, 65 Pac. 2d 1136; **Kaner v. Clark**, 108 Ill. A. 287; **Ex P. Tinsley**, 37 Tex. Cr. 517, 40 S. W. 306; **In Re Landau**, 243 N. Y. S. 732, 230 App. Div. 308, app. dismissed 255 N. Y. 567, 175 N. E. 316.

C. The clear scope and central purpose of the verified bill for the injunction was to preserve law and order in a situation alleged to involve imminent danger of lawlessness, violence, bloodshed and serious loss and damage to property of the city and others and mass violations of city and state laws, especially alleging interference in the use of the streets by the congregating of a large unruly mob with threatened breaches of the peace and mob violence in consummation of a conspiracy and threatened continuation of such conduct unless enjoined. All of which constituted an enjoinable public nuisance without regard

to Ordinance 1159. **In Re Debs**, 158 U. S. 564, 15 S. Ct. 900; 39 L. Ed. 1092; **City of New Orleans v. Liberty Shop**, 1924, 157 La. . . , 101 So. 797; **General City Code of Birmingham, 1944, Sec. 311**; Code of Alabama 1940 (1958 Rec. Ed.), Sections 505, 506; cf. **United States v. U. S. Klans, Knights of Ku Klux Klan, Inc.**, 1961, 194 Fed. Supp. 897; U. S. v. Parton, 1943 (C. C. A. 4), 132 Fed. 2d 886, 887; **Cox v. Louisiana** (Mr. Justice Black, dissenting), 1965, 379 U. S. 578, 85 S. Ct. 453, 468, 471.

The contempt convictions may be properly rested upon violation of those parts of the injunction writ prohibiting the congregation of mobs upon public streets and public places, and in connection therewith conduct calculated to cause a breach of the peace and violation of city and state laws, especially those related to the use of streets and sidewalks and such injunction writ is not void for vagueness or overbreadth. **In Re Debs**, 1895, 158 U. S. 564, 15 S. Ct. 900; **Congress of Racial Equality v. Clemmons**, 1963 (C. C. A. 5), 323 Fed. 2d 54, 58, 64 (Gewin, Circuit Judge, concurring); **Griffin v. Congress of Racial Equality**, 1963, 221 Fed. Supp. 899; cf. **United States v. United Klans, Knights of the Ku Klux Klan, Inc.**, 1961, 194 Fed. Supp. 897; cf. **Kelly v. Page**, 1964 (C. C. A. 5), 335 Fed. 2d 114.

D. No lack of due process is involved for lack of evidence to show the violation of such parts of such injunction. **Roliafico v. United States**, 237 Fed. 2d 97, 104 (C. A. 6, 1956); cert. den. 352 U. S. 1025, 77 S. Ct. 590, 1 L. Ed. 2d 597; **Blumenthal v. United States**, 332 U. S., pages 539, 559, 68 Sup. Ct. 248, 257; **United States v. Rosenberg** (C. C. A. 2, 1952), 195 Fed. 2d 583, 600, 601, cert. denied, 344 U. S. 838, 73 S. Ct. 20, 21, 97 L. Ed. 652, reh. denied, 344 U. S. 889, 73 S. Ct. 134, 180, 97 L. Ed. 687, reh. denied 347 U. S. 1021, 74 S. Ct. 860, 98 L. Ed. 1142, motion denied 355 U. S. 860, 78 S. Ct. 91, L. Ed. 2d 67; **In Re Debs**, 1895, 158 U. S. 564, 15 S. Ct. 900.

III.

Considering matters presented in I and II, we submit the constitutionality of Ordinance 1159 is not an issue which is appropriately required to be determined in this case, especially in view of the fact that its constitutionality has not been passed upon by the Supreme Court of Alabama which granted certiorari and has under review the decision of the Alabama Court of Appeals rendered on such ordinance in **Shuttlesworth v. City**, 43 Ala. App. 68, 180 So. 2d 114 (Petitioners brief, page 10, Footnote 7).

IV.

The trial court and the Alabama Supreme Court considered the defiant news releases and statements in their relationship to the conspiracy to violate the injunction, and as evidence of intent to wilfully violate without first moving to dissolve it. In its context of apparent intent to intimidate and exert pressure on the trial court, it was the feeling of counsel for the City that such acts constituted a basis to support the conviction of those involved but the Alabama Courts refused to so deal with the news release and related statements.

The convictions of petitioners were for a conspiracy to violate the injunction, it is therefore not necessary to the validity of such convictions that each petitioner is proven to have participated in each stage or every overt act in its consummation where the evidence discloses he was a participant in and a part of the over-all conspiracy.

Each conspirator is guilty in equal degree for "all that may be or has been done" whether he entered the conspiracy at the beginning or later. **Poliafico v. United States**, 237 Fed. 2d 97, 104 (C. C. A. 6, 1956); cert. den. 352 U. S. 1025, 77 S. Ct. 590, 1 L. Ed. 2d 597; **Blumenthal v. United States**, 332 U. S., pages 539, 559, 68 Sup. Ct. 248, 257; **United States v. Rosenberg** (C. C. A. 2, 1952),

195 Fed. 2d 583, 600, 601, cert. denied 344 U. S. 838, 73 S. Ct. 20, 21, 97 L. Ed. 652, reh. denied, 344 U. S. 889, 73 S. Ct. 134, 180, 97 L. Ed. 687, reh. denied 347 U. S. 1021, 74 S. Ct. 860, 98 L. Ed. 1142, motion denied 355 U. S. 860, 78 S. Ct. 91, L. Ed. 2d 67; **In Re Debs**, 1895, 158 U. S. 564, 15 S. Ct. 900.

The penalty assessed showed no distinction between the principals who made the defiant statements and gave out the defiant news releases and those who had lesser facts in the conspiracy to violate the injunction.

Certainly these petitioners were deprived of no constitutional rights to influence the reversal of the Alabama Supreme Court in connection with such verbal acts in consummation of the conspiracy.

V.

The evidence in the record is adequate to sustain the convictions of petitioners Fisher and Hayes, both of whom are members of A. C. M. H. R., a party to the injunction suit, and although they had not been served with the writ knew of it prior to its violation. The evidence and inferences to be drawn therefrom leads to a conclusion they had notice or knowledge of what acts it prohibited, as the Alabama Supreme Court found. The doctrines of **Thompson v. Louisville**, 362 U. S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654; **Fields v. City of Fairfield**, 375 U. S. 248, only apply when there is complete lack of evidence from which an inference could be drawn to support the convictions. On certiorari the ordinary practice of this Honorable Court is not to review the weight or sufficiency of the evidence. **Whitney v. California**, 274 U. S. 397, 47 S. Ct. 641, 71 L. Ed. 594; **Milk Wagon Drivers Union v. Meadowmoor Dairies**, 312 U. S. 287, 61 S. Ct. 552, 85 L. Ed. 836; **Portland R. L. and P. Co. v. Railroad Commission**, 229 U. S. 397, 33 S. Ct. 829, 57 L. Ed. 1248.

ARGUMENT.

I.

The Convictions Should Be Affirmed on the Rule of HOWAT v. KANSAS and MINE WORKERS Without Reaching Constitutional Issues Concerning Ordinance 1159.

The Supreme Court of Alabama did not enter into consideration of the alleged invalidity of Sec. 1159 of the City Code of Birmingham. The case was decided on what we believe is an adequate state ground. The injunction order, issued by a circuit judge in equity, who was clothed with constitutional and statutory jurisdiction[11] to issue an injunction in a case arising with respect to matters and parties physically within its jurisdiction.

In **Howat v. Kansas**, 258 U. S. 181, 42 S. Ct. 277, relied upon by the Alabama Supreme Court, the United States Supreme Court in a unanimous opinion written by Mr. Chief Justice Taft in Case No. 491, one of the two cases

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[11] Both are quoted in the Alabama Supreme Court Opinion (R. 439) and are as follows: "Sec. 144. A circuit court, or a court having the jurisdiction of the circuit court, shall be held in each county in the state at least twice in every year, and judges of the several courts mentioned in this section may hold court for each other when they deem it expedient, and shall do so when directed by law. The judges of the several courts mentioned in this section shall have power to issue writs of injunction, returnable to the courts of chancery, or courts having the jurisdiction of courts of chancery."

"§ 1038. Injunctions may be granted, returnable into any of the circuit courts in this state, by the judges of the supreme court, court of appeals, and circuit courts, and judges of courts of like jurisdiction."

"§ 1039. Registers in circuit court may issue an injunction, when it has been granted by any of the judges of the appellate or circuit courts when authorized to grant injunctions, upon the fiat or direction of the judge granting the same indorsed upon the bill of complaint and signed by such judge."

decided, review of a contempt conviction in the courts of Kansas was sought. The injunction issued to enjoin a strike in the mining industry. Petitioners alleged the Industrial Court Act of Kansas "was void because in violation of the federal constitution and the rights of defendants thereunder, and so the court was without power to issue an injunction as prayed." 258 U. S. at pages 187-188. The position of the Kansas Supreme Court was that the defendants were precluded from such attack in a collateral contempt proceeding.

The U. S. Supreme Court agreed (258 U. S., at pages 189-190):

> "An injunction duly issuing out of a court of general jurisdiction with equity powers, upon pleading properly invoking its action, and served upon persons made parties therein, and within the jurisdiction, must be obeyed by them, however erroneous the action of the Court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for errors by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of its lawful authority to be punished. Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 450, 31 Sup. Ct. 416, 55 L. Ed. 797, 34 L. R. A. (U. S.) 874; Toy Toy v. Hopkins, 212 U. S. 542, 541, 29 Sup. Ct. 416, 53 L. Ed. 644. See also United States v. Shipp, 203 U. S. 563, 27 Sup. Ct. 165, 51 L. Ed. 319; 8 Ann. Cas. 265
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> As the matter was disposed of in the State Courts on principles of general, and not federal law, we have no choice but to dismiss the writ of error as in No. 154."

Mr. Chief Justice Vinson, in **United States v. United Mine Workers**, 330 U. S. 258, 67 S. Ct. 677, quotes with favor the first paragraph above quoted from **Howat v. Kansas**, concerning the duty to obey an injunction though it may be based upon an unconstitutional or void law, and concludes:

> "Violations of an order are punishable as criminal contempt even though the order is set aside on appeal, Warden v. Searls, 121 U. S. 14, (1887), or though the basic action has become moot, Gompers v. Buck Stove & Range Co., 221 U. S. 418 (1911)." (330 U. S. 258, 293, 294.)

The Alabama Supreme Court also relied upon the **United Mine Workers** case and quoted at length from it (R. 440-444). It also cited the concurring opinion of Mr. Justice Harlan in **In Re Green**, 369 U. S. 689, 693 (R. 444).

In Re Green is cited and relied upon by petitioners under Sections I and II of their brief in substantial effect that this case in some way weakens the application of **Howat v. Kansas**, 258 U. S. 181, and **United Mine Workers**. We do not feel **Re Green** in any way conflicts with the result reached by the Alabama Supreme Court in applying the doctrine of **Howat v. Kansas** and **United Mine Workers** to the instant case.

In **Green**, a member of the bar was sentenced to jail and fined for contempt. When advised by the clerk an injunction had been requested, he expressed his desire for a hearing for which he was ready at any time. The injunction was nevertheless issued ex parte. He then immediately asked for a hearing; but none was granted. At the time the ex parte injunction was granted, the union had on file with the National Labor Relations Board a charge of an unfair labor practice concerning the same controversy, but no hearing had been held on it.

Petitioner believed under Ohio law the injunction was invalid because issued without a hearing and also because the controversy was one for the National Labor Relations Board and not for the state court. He therefore advised the union officials the injunction was invalid and the best way to contest it was to continue the picketing and to appeal or test any order of commitment for contempt by habeas corpus. Green was held in contempt for giving this advice and although he was not allowed to testify in his defense at the contempt hearing he offered to testify that, "I was convinced that both the judge and Mr. Ragan (opposing counsel) were aware that I had consented to bring these men before the court and stipulate the essential matters for the express purpose of testing the validity of the court's order and its jurisdiction over the subject matter."

The majority opinion of this Honorable Court commented upon the conviction without a hearing and the evils thereof, but also did refer to **Mine Workers**, and distinguish it on the authority of **Amalgamated Association of St. Elec. Ry. & Motor Coach, etc. v. Wisconsin Employment Relations Board**, 340 U. S. 383, 71 S. Ct. 359, 95 L. Ed. 364, as holding that a state court is without power to hold one in contempt for violating an injunction that the state court had no power to issue by reason of federal statutory pre-emption.

We respectfully contend that cases such as **In Re Green**[12] and **Amalgamated Association, etc. v. Wis. Emp. Rel. Bd.**,

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[12] Footnote 1 on page 693 of 369 U. S. mentions the fact that Mr. Chief Justice Vinson wrote the opinion in **Mine Workers** and also **Amalgamated Association, etc.** This is to emphasize the point that the doctrine of the first case does not conflict with the second. However, there is another distinction between the two cases other than that the former dealt with a federal court order, and the latter, a state order, in a controversy as to which Congress had pre-empted the field, where if the federal policy is to prevail, federal power must be complete. In **Mine Workers** criminal contempt was involved in the pertinent ques-

supra, dealing with the doctrine of federal pre-emption and where no intent to flout the authority of the court was involved, do not in any way resemble and have no application to cases circumstanced as the instant one, where no federal pre-emption statute is involved and where the injunction order issued to protect lives and property, a matter of state concern and state court jurisdiction,[13] was openly defied and violated, and its authority flouted, without seeking its dissolution or discharge, and circumstances of mob violence, resulting in personal injury and property damage.

Petitioners suggest the **Mine Workers** decision should be distinguished, limited, or overruled. **Howat v. Kansas** also relied upon by the Alabama Supreme Court is obviously directly in point to require the denial of their petition for writ of certiorari.

The principal significance of **Mine Workers** is the stamp of approval it places on **Howat v. Kansas.** We have hereinabove discussed our position that neither the Wisconsin case, nor **In Re Green,** supra, decided since **Mine Workers,** conflict with the state ground doctrine of **Howat v. Kansas,** limiting certiorari review of convictions for criminal con-

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tion, 330 U. S. at 293, 294. In **Amalgamated Association** the order was to recall the strikers to their jobs. The Wisconsin Supreme Court expressly held the contempt conviction was for the benefit of the Wisconsin Board and was referred to as "wilful and contumacious civil contempt," 258 Wis. 1, 44 N. W. 2d 547, at page 550.

[13] Matters related to the preservation of law and order in a local community are under our federal system matters for local authorities and of local court jurisdiction. **City of Greenwood v. Peacock,** 86 S. Ct. 1800, 384 U. S. 808, 1966, dealing with remandment of a removal of state court criminal prosecutions in which the Court said: "First, no federal law confers an absolute right on private citizens, on civil rights advocates, on Negroes, or on anybody else, to obstruct a public street, to contribute to the delinquency of a minor, to drive an automobile without a license, or to bite a policeman. Second, no federal law confers immunity from state prosecution on such charges."

tempt in the absence of any orderly attempt to dissolve or discharge a temporary injunction before committing wilful and defiant contempt, to the bare question of the general authority of the court to issue an injunction without considering the constitutional validity of an ordinance upon which the injunction is based.

The thrust of petitioners argument I is denial of due process of law and equal protection of the laws by the failure of the trial court to admit evidence that Ordinance 1159 was discriminatorily applied before the injunction was issued. Of course, this simply means a contention that the ordinance as applied by the City is unconstitutional. This could only be shown by evidence going to the merits of the injunction suit.

In the absence of any appropriate measures to dissolve or modify the temporary injunction, the trial court properly concluded the only issues before it were its jurisdiction over the subject matter invoked by a bill of complaint properly making parties within the jurisdiction respondents[14] and whether the injunction was wilfully violated by the respondents, with knowledge or notice of the injunction.

The Alabama Supreme Court also agreed with this position in its opinion and expressly held the question of the

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[14] The trial court made two statements on this subject. The first, from page 140 of the Record reads: "The Court: The only question I can see about the jurisdiction of the Court is whether the Court is an equity court and whether or not these parties who are present were served and were notified of this injunction, whether they were in the jurisdictional territory that this court embodies; the only question is whether they got notice and then whether or not the injunction that was issued was issued by a judge who had the equity authority to issue an injunction, and then whether or not they knowingly violated this injunction. Your motion will be overruled." In its opinion and decree the trial court made a statement of similar import (R. 422). Please also see ante, page 19.

constitutionality vel non of the ordinance was not an issue for its consideration, following the principle stated in **Howat v. Kansas**, 258 U. S. 181, and **United Mine Workers** (R. 440-444). This principle has received almost universal adherence, both in Federal and State Courts.[15]

Adequate state ground supporting these convictions without reaching the question of whether the ordinance was or was not constitutional is fully established by these and other authorities, both in Alabama and elsewhere as we noted above. But it is argued the Alabama Court injunction was void for failure to allow assertion of an alleged federal constitutional defense in that such evidence was excluded as it related to matters occurring prior to the injunction.

A.

The Alabama court had jurisdiction to determine its jurisdiction.

The temporary injunction was not void.

The argument of petitioners last above mentioned is in conflict with the rule of **Shipp v. United States**, 1906, 203 U. S. 563, 27 S. Ct. 165, supra; **United Mine Workers; Howat v. Kansas**, 1922, 258 U. S. 181, supra, and many others which hold that where a temporary injunction or restraining order is issued, criminal contempt conviction will be upheld where intentionally violated without seeking its dissolution or dismissal. The reason is that a court of equity has jurisdiction on a bill filed seeking an injunc-

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[15] In Corpus Juris, Vol. 32, at page 482, note 13, starting with **Howat v. Kansas**, 258 U. S. 181, cases from some 30 states and other Federal cases are cited in support of this proposition. These authorities are supplemented in 43 C. J. S., at page 1007, note 65. Note 65 is cited to support the statement: "Where the court had jurisdiction, the fact that the injunction or restraining order, or the order for the same is merely erroneous, or was improvidently granted as irregularly obtained, is no excuse for violating it."

tion to determine its jurisdiction, even though it may ultimately determine it has no such jurisdiction, and such injunction must be obeyed. Mr. Chief Justice Vinson, speaking for the majority in **United Mine Workers**, cited with approval **Carter v. United States**, 1943 (C. A. 5), 135 Fed. 2d 858. There a criminal contempt conviction was upheld although the issuing court was determined to have no jurisdiction to issue the injunction which enjoined a labor leader from certain activities such as picketing and interfering with deliveries to a restaurant in New Orleans, Louisiana where a labor dispute was in progress. The Court of Appeals held the District Court was without jurisdiction to issue the injunction but, relying upon **Shipp v. United States**, 203 U. S. 563, 27 S. Ct. 165, supra, said:

> "The order was, while it lasted, a lawful one, such as a District Court of the United States in the exercise of its equity powers could make, pending a hearing of a doubtful question of jurisdiction. The question of jurisdiction was not frivolous. It had never before been decided. . . . The District Court concluded it had jurisdiction, and if appeal had not been taken, Carter would have been bound by the judgment. We have reversed that conclusion, but we think the restraining order made to preserve the subject of litigation, to-wit: Coumanis' business, pending a hearing was not by the reversal rendered unlawful or void. The United States may punish wilful disobedience of it. We have sustained a similar temporary order as a basis for punitive contempt proceedings, though the law under which the suit was alleged to arise proved to be unconstitutional, in **Locke v. United States**, 5 Cir., 75 Fed. 2d 157. See also Howat v. Kansas, 258 U. S. 181, 42 S. Ct. 277, 66 L. Ed. 550."

In **Blake v. Nesbet**, 1905, 144 Fed. 279, 283, 284, also cited with favor by Mr. Chief Justice Vinson in **Mine**

Workers, a similar question arose. The definition of the word "jurisdiction" was stated. "Jurisdiction is the power to hear and determine a cause. The authority by which judicial officers take cognizance and decide cases". The Court, at page 284, went on to quote **State ex rel. Carroll v. Campbell et al.**, 25 Mo. App., loc. cit. 639, Lewis, P. J., as follows:

> "The return avers that, on the face of the record, it appears that the case is not one in which an injunction should ever have issued, and that the relator was never entitled to an injunction on the facts stated. If this proposition were true, it would be wholly irrelevant and immaterial to the matter in hand. That an injunction was, in fact, granted by a competent authority, held to be such under the laws of this state, is sufficient to render the defendants liable as for a contempt, if they have willfully disobeyed it, as the information charges."

The court also referred to the many authorities sustaining this principle of law. On the same page appears a quotation from **10 American & Eng. Enc. of Pleading & Practice:**

> "It is well settled, and the books are full of cases holding, that a defendant who has disobeyed an injunction cannot justify his disobedience by showing that the injunction was improvidently or erroneously granted or irregularly served; and that if the injunction has been improperly allowed the only remedy is by a motion to vacate or dissolve it."

Further on the question of jurisdiction, the court said:

> "In Clark v. Burke, 163 Ill. 334, 45 N. E. 235, it was held that in an attachment for contempt in failing to obey an order of the court the respondent may question the order which he is charged with refusing

to obey only in so far as he can show it to be absolutely void for want of jurisdiction either of the party, the subject-matter, or the authority to pronounce the particular judgment. See, also, Kerfoot v. People, 51 Ill. App. 410; Tolman v. Jones, 114 Ill. 147, 28 N. E. 464; Billard v. Erhart, 35 Kan. 616, 12 Pac. 42; William Rogers Mfg. Co. v. Rogers, 38 Conn. 121; Woodward v. Lincoln, 3 Swanst. 626; Netherwood v. Wilkinson, 33 Eng. L. & Eq. 297; People v. Bergen, 53 N. Y. 405; Kaehler v. Halpin, 59 Wis. 40, 17 N. W. 868; Moat v. Holbein, 2 Edw. Ch. (N. Y.) 188." 144 Fed. at page 283.

The Alabama Supreme Court has without exception adhered to the principle established by **Mine Workers** and the cases cited with approval therein, since it was decided March 6, 1947. In fact, it was followed in **Ex Parte Hacker**, June 12, 1947, 250 Ala. 64, 33 So. 2d 324, 337, a case pending in the Alabama Supreme Court when the decision in Mine Worders was rendered. This case and the companion case, **Hotel and Restaurant Employees v. Greenwood**, 249 Ala. 265, 30 So. 2d 696, Cert. Den. 322 U. S. 847, 68 S. Ct. 349, will be more fully discussed in Section B, following.

That petitioners, or at least the principal persons, Dr. King, Rev. Walker, Rev. Shuttlesworth, Rev. Abernathy, and Rev. A. D. King, who was also present, knew the proper way to test the validity of the injunction was to move to dissolve it. This was discussed at the news conference on the morning of April 11th (R. 252). But they deliberately chose to violate it without filing such motion.

Further under Alabama Supreme Court Rule 47 (App. pages 76-77, appeal from any decree rendered by the trial court on such motion is preferred and the ordinary rules may be suspended to expedite review by the Alabama Supreme Court.

B.

The principle above stated in I has been applied in cases involving First and Fourteenth Amendment freedoms.

In **Howat v. Kansas** (1922), 258 U. S. 181, supra, the injunction was issued against Howat and 150 members of the United Mine Workers of America, District 14, on a bill of complaint charging them with a conspiracy to call a strike in violation of the laws of Kansas and particularly the Court of Industrial Relation Act of that state. The injunction was to enjoin respondents "from directing, ordering or in any manner bringing about the hindering, delaying, interference with or a suspension of the operation of any coal mines . . .". 258 U. S. at page 188.

While the permanent injunction was attacked as void for violation of the Federal Constitution and rights of respondents thereunder, no specific parts of the Constitution are named. However, it is obvious that the sweeping ambit of the injunction included a violation of the Thirteenth Amendment, as well as the First and Fourteenth, restraining peaceful picketing, peaceful assembly and peaceful persuasion, in connection with a labor controversy. These are protected under many decisions of this Honorable Court, including **Thornhill v. Alabama**, 310 U. S. 88, 60 S. Ct. 736.

Another case of similar import is **Local 333 B, United Marine Division of Int. Longshoremen Assn. v. Commonwealth of Virginia**, 1952, 193 Va. 773, 71 S. E. 2d 159, cert. denied, 344 U. S. 893, 73 S. Ct. 212. In this case also the temporary injunction restrained respondents from engaging in strike or work stoppage until it had complied with certain provisions of the Virginia Public Utilities Labor Act, which respondents claimed was not applicable to them and also in contempt proceedings for violation of the injunction without moving to dissolve it, claimed the act was unconstitutional. The trial court

refused to allow this defense to be raised in the contempt proceeding because it constituted a collateral attack upon a judgment of a court of competent jurisdiction.[16]

It is also worthy of note that **Schwartz v. United States**, 1914 (CCA-4), 217 Fed. 866, cited with approval by Mr.

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[16] The Virginia Supreme Court of Appeals, relying upon and quoting from Howat v. Kansas and United States v. Mine Workers further stated at pages 165 and 166:

"The general rule is that where a court has jurisdiction of the parties and the subject matter to pronounce a judgment, such judgment cannot be attacked collaterally even if the statute upon which it is based is later declared to be unconstitutional. In Howat v. Kansas, 258 U. S. 181, 189, 42 S. Ct. 277, 280, 66 L. Ed. 550, Chief Justice Taft said: 'An injunction duly issuing out of a court of general jurisdiction with equity powers, upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming, but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished. Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 450, 31 S. Ct. 492, 55 L. Ed. 797; Toy Toy v. Hopkins, 212 U. S. 542, 548, 29 S. Ct. 416, 53 L. Ed. 644. See also United States v. Shipp, 203 U. S. 563, 573, 27 S. Ct. 165, 51 L. Ed. 319. . . .

Mr. Chief Justice Vinson, in U. S. v. United Mine Workers of America, 330 U. S. 293, 67 S. Ct. 677, 696, 91 L. Ed. 884, said: '* * * we find impressive authority for the proposition that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings. This is true without regard even for the constitutionality of the Act under which the order is issued.' In support of this principle the Chief Justice cited the following cases: Howat v. Kansas, 258 U. S. 181, 42 S. Ct. 277, 66 L. Ed. 550; Russell v. United States, 8 Cir., 86 F. 2d 389; Locke v. United States, 5 Cir., 75 F. 2d 157; O'Hearne v. United States, 62 App. D. C. 285, 66 F. 2d 933; Schwartz v. United States, 4 Cir., 217 F. 866; Brougham v. Oceanic Steam Navigation Co., 2 Cir., 205 F. 857; Blake v. Nesbet, 8 Cir., 144 F. 279."

71 S. E. 2d at pages 165, 166.

Chief Justice Vinson in **Mine Workers** involved conviction for aiding and abetting striking miners who had been enjoined from striking in the violation of the injunction by furnishing them with a place of meeting near the mines. The miners were obviously enjoined from peaceful persuasion or free speech and from assembly, both well recognized First and Fourteenth Amendment Freedoms. On the defense offered to the contempt proceeding by respondent that the court exceeded its power in issuing the injunction, the court said (217 Fed. at page 869):

> "There is no force in the position that the judgment should be reversed because the court exceeded its power in adjudging the defendant guilty of contempt for furnishing a meeting place for organizers of the United Mine Workers of America and others, and thus aided them in inducing by force, threats, intimidation, and **persuasion** the employees of West Virginia-Pittsburg Coal Company to quit work. It is true that the judgment for contempt, as well as the order of injunction, will be set aside on writ of error, when the trial court had no jurisdiction to make the order of injunction. In re Rowland, 104 U. S. 604, 26 L. Ed. 861; In re Fisk, 113 U. S. 713, 5 Sup. St. 724, 28 L. Ed. 1117; In re Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402; United States v. Shipp, 203 U. S. 563, 27 Sup. Ct. 165, 51 L. Ed. 319, 8 Ann. Cas. 265. But that condition is not presented here. The court had jurisdiction of the subject-matter—the protection of the West Virginia-Pittsburg Coal Company in its property rights—and of the defendant, who had appeared in the cause to answer the charge that he had unlawfully interfered with those rights" (Emphasis added).

However, the court cited its earlier case, **John Mitchell et al. v. Hitchman Coal & Coke Company**, 214 Fed. 685,

131 CCA 425, recognizing that the injunction violated their rights (constitutional rights under Thornhill v. Alabama, 310 U. S. 88, we interpolate) in enjoining the promotion of a labor union by persuasion and other peaceful means. The Court of Appeals stated that had the order issuing the injunction been properly attacked in the injunction suit on appeal from an adverse decree of the District Court, it would have been modified in his behalf.

In **Hotel and Restaurant Employees, etc. v. Greenwood,** 249 Ala. 265, 30 So. 2d 696, cert. den. 322 U. S. 847, 68 S. Ct. 349; the Supreme Court of Alabama in a case on appeal from a decree enjoining a strike and peaceful picketing incident thereto, when the strike was for a lawful purpose, at 30 So. 2d, page 700, said:

> "The limit of judicial authority to restrain a strike without impairment of the freedoms guaranteed by the several amendments to the federal constitution is to be determined by the lawfulness of the object aimed at and the manner in which the strike is conducted. If the object is within the scope of union activity, that is, reasonably related to wages, hours or other conditions of immediate employment and is lawfully and peaceably carried out and not attended with violence or other unlawful acts, it should not be subjected to judicial restraint. This principle, as we view it, is implicit in the guarantee of the Fourteenth Amendment to our federal constitution as an incident of freedom of speech, as lately declared by decisions of the United States Supreme Court. Thornhill v. State of Alabama, 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093; American Federation of Labor v. Swing, 312 U. S. 321, 61 S. Ct. 568, 85 L. Ed. 855; Steiner v. Long Beach Local, supra."

The Supreme Court of Alabama reversed the injunction decree because it violated the Constitutional guarantees of freedom of speech and assembly of the respondents.

However, in the companion case, **Ex Parte Hacker** (June, 1947), 250 Ala. 64, 33 So. 2d 324, 337, that court in reliance upon **United Mine Workers**, reversed conviction of civil contempt for violating the **Greenwood** injunction, which was held to be unconstitutional and invalid. However, the Alabama Court also held that the required reversal of the civil contempt conviction "did not stand in the way of any proceeding for criminal contempt and is without prejudice in regard thereto" (33 So. 2d at page 337).

The same result was reached in Fields v. City of Fairfield, 273 Ala. 588, 143 So. 2d 177, reversed on other grounds in 375 U. S. 248, where the Alabama Supreme Court relied upon **Howat v. Kansas**, 258 U. S. 181, and **United States v. United Mine Workers**, 330 U. S. 258. In that case the Alabama Supreme Court held Fields could not attack in collateral proceedings the unconstitutionality of a Fairfield ordinance which provided "It shall be unlawful for any person or persons to hold a meeting in the City of Fairfield without first having obtained a permit from the Mayor to do so."

It is obvious that freedom of assembly and freedom of speech were involved. But the Alabama Court held the constitutionality of the ordinance could not be raised in the collateral certiorari review from the criminal contempt conviction for violating the temporary injunction.

The Court did say the jurisdictional requirements were sufficient to sustain the jurisdiction of the court to issue the injunction and such order was not void on its face. However, it is obvious that the Alabama Court did not mean by the latter statement to entrench upon the fundamental rule applicable to temporary injunctions as stated in **Howat v. Kansas** and **United Mine Workers.**[17]

[17] We think it is more logical to conclude the Alabama Court only meant by the expression "not void on its face" that the

Submission is that insofar as the injunction decree could be said to be based upon the alleged unconstitutionality of Ordinance 1159, whether or not the ordinance is unconstitutional or has been unconstitutionally applied prior to the issuance of the temporary injunction are not issues before this Honorable Court to sustain reversal of the contempt convictions of petitioners. **Mine Workers** and **Howat v. Kansas**, and multitude of cases, state and federal, following them rest upon principles that form a bed rock upon which our civilization must stand.

C.

Respect for the law and the courts of the land is fundamental to the protection of minorities and majorities alike, without it no constitutional rights can endure.

Much has been written of the high place respect for the laws and courts of the land must have if our free democratic society is to be preserved for the common welfare of minority groups and majority groups alike. Mr. Justice Frankfurter, concurring in **United States v. United Mine Workers**, 330 U. S. at page 312, stated:

> "There can be no free society without law administered through an independent judiciary. If one man

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injunctive decree was not based on a frivolous assumption of jurisdiction. Please note the language of Mr. Justice Frankfurter in his concurring opinion in Mine Workers, 330 U. S. at pages 309, 310: "Only when a court is so obviously traveling outside its orbit as to be merely usurping judicial forms and facilities, may an order issued by a court be disobeyed and treated as though it were a letter to a newspaper. Short of an indisputable want of authority on the part of a court, the very existence of a court presupposes its power to entertain a controversy, if only to decide after deliberation, that it has no power over the particular controversy. Whether a defendant may be brought to the bar of justice is not for the defendant himself to decide.

To be sure, an obvious limitation upon a court cannot be circumvented by a frivolous inquiry into the existence of a power that has unquestionably been withheld."

can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny. Legal process is an essential part of the democratic process. For legal process is subject to democratic control by defined, orderly ways which themselves are part of law. In a democracy, power implies responsibility. The greater the power that defies law the less tolerant can this Court be of defiance. As the Nation's ultimate judicial tribunal, this Court, beyond any other organ of society, is the trustee of law and charged with the duty of securing obedience to it."

In **Gompers v. Bucks Stove and Range Company**, 221 U. S. 418, 31 S. Ct. 492, at page 501, we find:

"If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power' of the United States would be a mere mockery."

In a context of the use of the streets by minority groups, Mr. Justice Black in his dissent in Cox v. Louisiana, 379 U. S. 536, 559, 583, 584, 85 S. Ct. 453, 471, uses this language:

"The streets are not now and never have been the proper place to administer justice. Use of the streets for such purposes has always proved disastrous to individual liberty in the long run, whatever fleeting benefits may have appeared to have been achieved. And minority groups, I venture to suggest, are the ones who always have suffered and always will suffer most when street multitudes are allowed to substitute their pressures for the less glamorous but more dependable and temperate processes of the law. Experience demonstrates that it is not a far step from what to many seems the earnest, honest, patriotic, kind-spirited multitude of today, to the fanatical,

threatening, lawless mob of tomorrow. And the crowds that press in the streets for noble goals today can be supplanted tomorrow by street mobs pressuring the courts for precisely opposite ends.

Minority groups in particular need always to bear in mind that the Constitution, while it requires States to treat all citizens equally and protect them in the exercise of rights granted by the Federal Constitution and laws, does not take away the State's power, indeed its duty, to keep order and to do justice according to law. Those who encourage minority groups to believe that the United States Constitution and federal laws give them a right to patrol and picket in the streets whenever they choose, in order to advance what they think to be a just and noble end, do no service to those minority groups, their cause, or their country."

Former Justice Whitaker, resigned, in discussing the evils of so-called "civil disobedience" and disrespect for law in the civil rights "movement" in a recent speech calls attention to the fact that in his opinion sympathy for a minority group because of conditions in some sections of our country has caused many to mistakenly condone and possibly encourage such "civil disobedience" with its concomitant attitude of disobedience to court orders as well as lack of respect for the law.

The underlying thought of the speech was that the harvest reaped in a large measure was street violence, disregard for law, rioting, bloodshed, arson and destruction of property. The prevalence of such disorder during the last year or so has reached such proportions that it is judicially noticeable. The President of our great country was moved to take cognizance of such widespread violence and disorder. Speaking of riots in New York, Cleveland, Chicago, and other cities, mostly **not** in the South, he is

quoted in the press as having said in a speech in July, 1966, in Indianapolis:[18]

> "Riots in the streets do not bring about lasting reforms. They tear at the very fabric of the community. They set neighbor against neighbor and create walls of mistrust and fear between them. They make reform more difficult by turning away the very people who can and must support them."

The Mayor of Chicago, commenting on the presence of petitioner, Martin Luther King, in Chicago charged King's staff was fomenting the disorder in Chicago and trained youngsters in the making of fire bombs and "were in Chicago for no other purpose than to bring disorder to the streets of Chicago."[19]

Section I of our argument is to the point that, treating this case as simply one where the only charge made in the bill of complaint was the violation of Ordinance 1159 by failure to obtain a parading permit the conviction of petitioners for criminal contempt should not be reversed on any ground urged in opposing briefs, whether due process, equal protection of the laws or freedom of speech and assembly because of the failure to take proper steps to oppose the injunction before wilfully violating it. Arguendo we assume no illegal conduct other than the failure to obtain parade permits for the marches of April 12th and 14th.

Opposing briefs have urged the overruling or modification of **Howat v. Kansas** and **Mine Workers.** We urge retention without eroding or whittling away these fundamentally sound holdings.[20]

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[18] Birmingham News, July 24, 1966, from press reports.

[19] Birmingham News, July 16, 1966, release from Chicago.

[20] "There is an added reason why we must turn to the decisions. 'Great cases,' it is appropriate to remember, like hard

Section II of our brief will consider other aspects, the injunction and the illegal acts and conduct which we feel also justify affirmance of the contempt convictions.

II.

Aside From Violation of Ordinance 1159 the Contempt Conviction Should Be Affirmed on the Basis of Other Unlawful Conduct in Violation of the Injunction.

In Section I, we have considered only Ordinance 1159 as a basis for the injunction, assuming no other violations and assuming such conduct free of any other elements of unlawfulness. Submission is that the contempt convictions of petitioners are not vulnerable on account of the contentions made in briefs filed on behalf of petitioners and by the United States as amicus curiae on constitutional grounds asserted, including lack of due process, equal protection of the laws, freedom of speech and assembly for the additional reason that the conduct of which they were convicted was otherwise unlawful and contumacious.

A.

The conduct of petitioners was otherwise unlawful.

The events of April 12th and April 14th, and especially the latter, when a huge throng was gathered by the efforts of and under the command of the leaders of this "movement" and which took complete control of the public

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cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.' Mr. Justice Holmes, dissenting in Northern Securities Co. v. United States, 193 U. S. 197, 400-401, 24 S. Ct. 436, 468, 48 L. Ed. 679." **Dennis v. United States** (1951), 341 U. S. 494, 528, 71 S. Ct. 857, 877, Mr. Justice Frankfurter, concurring.

streets of the City of Birmingham, from sidewalk to sidewalk on route to the City Hall or City Jail and formed a howling, cursing, violent mob, inflicting injury to persons and damage to property are entirely beyond the scope of lawful constitutionally protected conduct.

The destination of the latter march was shrouded in secrecy, but whether to City Hall or City Jail would traverse some of the main thoroughfares in the City of Birmingham heavily travelled by pedestrians and motor vehicles. While the police kept vehicular traffic and whites out of the immediate area where the crowd was gathering, the path of this horde, when it commandeered the streets and started the march was calculated to sweep aside other pedestrians both black and white lawfully using the sidewalks. It was on collision course with the white population which had been excluded from this area. It was also incompatible with the use of the streets by ambulances and fire trucks and motorists entitled to use them.

State laws and City ordinances governing the use of streets and sidewalks which were being violated or their violation imminently threatened are listed in the appendix hereto, pages 77-79. Both state laws and city ordinances being violated require pedestrians to walk upon sidewalks, and to use the right half thereof. Title 36, Code of Alabama, 1940 (Rec. 1958), Section 58, subsections (16), (18) and (19), app. 79-80; Traffic Code of Birmingham, Sec. 10-3 and 10-8, app. 81-82.

The gathering of the violent mob was in conflict with the ordinance making it unlawful to commit any act or diversion "causing or tending to a breach of the peace." General City Code of Birmingham, Alabama 1944, Sec. 311, App. 83. Also this conduct was an enjoinable public nuisance. Title 37, Code of Alabama 1940, Secs. 505, 506, App. 79-80; General City Code of Birmingham, Sec. 804, App. 82-83.

B.

Such unlawful conduct is not constitutionally protected nor immunized from punishment for contempt by the fact that 1159 in part supported the injunction.

The First and Fourteenth Amendments do not confer absolute right on minority groups to patrol, march, picket, or otherwise use the streets as means of communicating ideas whenever they choose, in order to advance what they think to be a just and noble cause. **Cox v. Louisiana,** 379 U. S. 536, at pages 554-556, majority opinion; at pages 583, 584, Mr. Justice Black, dissenting. Municipal authorities have a duty to protect and preserve the use of the streets and sidewalks for the purposes for which they are designed for the benefit and welfare of the public. **Cox v. State of New Hampshire,** 312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049.

Picketing, marching and patrolling the streets are not afforded the same kind of freedom of speech by the First and Fourteenth Amendments as those amendments afford those who communicate ideas by pure speech. It is only peaceful parades or processions, conducted with due regard for the concomitant right of the use of the streets for the welfare of the public and with obedience to laws enacted to govern the conduct of all in their use, that can claim the protection of these amendments. **Cox v. Louisiana,** 379 U. S. 536, 554-557. Mr. Justice Goldberg struck down the statute involved because unbridled discretion was vested in a public officer to prohibit **peaceful** parades, 379 U. S. 557.

At page 554 of 379 U. S., it is said:

> "The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel upon the streets is a clear example of governmental re-

> sponsibility to insure this necessary order . . . One would not be justified in ignoring the familiar red light because this was thought to be a means of social protest. Nor could one, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly. Governmental authorities have the duty and responsibility to keep their streets open and available for movement."

The horde commandeering the street and both sidewalks in one great avalanche of humanity was not engaged in a lawful activity for which it could claim any constitutional protection. Casting aside any question of failure to obtain a parade permit, this conduct in complete disregard of relevant traffic laws governing the use of the streets for the benefit of the public as a whole was not protected by the Constitutional Amendments.

The formation of the violent mob with injury to persons and damage to property makes the entire incident even more certainly unprotected conduct.

Assuming arguendo: 1, that 1159 is unconstitutional; 2, that it was unconstitutionally applied prior to the issuance of injunction and that said fact renders the injunction void; and 3, that the rule of **Mine Workers** and **Howat v. Kansas**, did not apply, the convictions should nevertheless be affirmed.

The injunction is broader in scope than the issue relating to 1159. That was only a part. Other provisions of the injunction violated adequately support the contempt convictions. This point we shall attempt to develop in later subdivisions of II.

The petitioners acquired no added rights because of the inclusion of violation of 1159 as a part of the injunction suit and as one of the grounds supporting the contempt convictions.

The invalidity of a part of the injunction order would not affect the valid part, regardless of the reason for its invalidity. **Liquor Control Commission v. McGillis,** 291 Utah 586, 65 P. 2d 1136; **Kaner v. Clark,** 108 Ill. A. 287; **Ex Parte Tinsley,** 37 Texas Cr. 507, 40 S. W. 306; **In Re Landau,** 243 N. Y. S. 732, 230 App. Div. 308, appeal dismissed, 255 N. Y. 567, 175 N. E. 316.

C.

The scope and purpose of the injunction was to preserve law and order. They adequately support the contempt convictions.

As alleged in the injunction bill of complaint, the respondents named therein conspired to encourage, to commit or participate in mass street parades, . . . congregating in mobs upon the public streets, and other public places . . . violation of numerous ordinances and statutes of the City of Birmingham and the State of Alabama; that said conduct, actions and conspiracies of the said respondents is such conduct as is calculated to provoke breaches of the peace in the City of Birmingham; that such conduct, conspiracies and actions of said respondents as aforesaid threatens the safety, peace and tranquility of the City of Birmingham (R. 31, 32).

Allegations of specific past instances of unlawful conduct included fostering, encouraging, and causing the formation of a mob of some 700 to 1000 Negroes to encourage a march upon the City Hall, which said mob became unruly, blocked the sidewalks and refused to obey lawful orders of officers of the Police Department in their efforts to disperse said unruly mob (R. 33, 34).

It is also alleged that the continued and repeated acts of respondents as alleged will cause incidents of violence and bloodshed (R. 35).

The prayer of the bill specifically sets forth the acts sought to be enjoined by relating them to the acts **hereinabove**, that is the acts and conduct alleged in the body of the bill of complaint. These allegations of the bill serve to clarify its prayer for an injunction prohibiting engaging in, sponsoring, inciting or encouraging "congregating upon public streets or public places into mobs . . . performing acts calculated to cause breaches of the peace . . . or from violating the ordinances of Birmingham and the Statutes of Alabama." In other words, the prohibitions of the prayer, if not clear within themselves, are appropriately considered in the light of the acts alleged to have been committed or those threatened.

Opposition briefs urge the prohibitions of the above mentioned sections of the injunction are vague. We do not concede this to be true. Mobs, which respondents were prohibited from inciting, sponsoring, encouraging or engaging in clearly include unruly mobs such as those of April 12th and April 14th, the forerunner of them having occurred on April 7th and described in paragraph 4 (c) of the bill of complaint. The ordinances and statutes which they were prohibited from violating included traffic violations and the acts tending to cause breaches of the peace which were enjoined obviously included those which were the result of or reasonably to be expected from the formation of a mob such as that described in 4 (c) (R. 33, 34).

The amicus brief also suggests the possible lack of jurisdiction of a court of equity to issue an injunction of this kind and overbreadth of the injunction as well. **In re Debs**, 1895, 158 U. S. 564, 15 S. Ct. 900, is an answer to both suggestions.

The authority of a court of equity to protect property and preserve order by an injunction which may restrain acts also criminal in nature is sustained in **In re Debs**,

supra, on the ground that equity may restrain a public nuisance. 15 S. Ct. at page 909.

It is worthy of note that the State of Alabama specifically authorizes municipalities to enjoin commission or continuance of public nuisances and they are made unlawful by city ordinance.[21] However, as indicated in **Debs**, the general jurisdiction of equity is sufficient without specific statutory authority. To the same effect is **United States v. Parton**, 1947 (CCA-4), 132 Fed. 2d 886, 887. In that case the fact that the defendants were engaged in conduct detrimental to but not subject to penal provisions of the laws enacted by Congress to protect Indian Wards of the government was held to be not a reason for denying, but as stated by the court is "an additional reason for granting injunctive relief. Coosaw Mining Co. v. South Carolina, 144 U. S. 550, 567, 12 S. Ct. 689, 36 L. Ed. 537". 132 Fed. 2d at page 887.

That the state is under duty to keep order cannot be questioned. **Cox v. State of Louisiana**, 379 U. S. at page 584, Mr. Justice Black dissenting. It must, of course, enforce its laws with even handed justice. Otherwise, equal protection of the laws would not be afforded. It should be noted that in a concurring opinion in one of the cases involved in **Cox v. State of Louisiana**, 379 U. S. at page 468, Mr. Justice Black expresses the view that picketing, patrolling or marching upon a public street is not a right granted by the First and Fourteenth Amendments of freedom of speech, press or assembly because they communicate ideas but are not constitutionally protected speech, certainly unless the people involved **are where they have a right to be.**[22]

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[21] Statutes and ordinance are cited in II-A, ante page 49.

[22] We quote from the pertinent part of Mr. Justice Black's Statement: "The First and Fourteenth Amendments, I think, take away from government, state and federal, all power to re-

Surely it cannot be rationally argued that the horde which took over one of the streets of Birmingham with both abutting sidewalks enroute to the City Jail some two miles away or to City Hall nearly a mile away over busy city thoroughfares were where they had a right to be. Such conduct was clearly unlawful and enjoinable.

On any question of failure to afford equal protection of the laws, we emphatically state that justice was even handed. Nothing like this had ever occurred in the City of Birmingham, so far as we are aware and have been able to ascertain.

Turning to the overbreadth contention, we note that we have at the beginning of II-C considered petitioners related argument of alleged vagueness of the injunction in this respect. We think it applicable here.

Before continuing with the overbreadth question, we digress to comment on the vagueness argument of petitioners concerning the part of the injunction violation as it relates to 1159, parading without a permit, and which we have discussed in Section I of our argument.

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strict freedom of speech, press, and assembly **where people have a right to be for such purposes.** This does not mean however, that these amendments also grant a constitutional right to engage in the conduct of picketing or patrolling, whether on publicly owned streets or on privately owned property. See National Labor Board v. Fruit and Vegetable Packers and Warehousemen, Local 760, 377 U. S. 58, 76, 84 S. Ct. 1063, 1073, 12 L. Ed. 2d 129 (concurring opinion). Were the law otherwise, people on the streets, in their homes and anywhere else could be compelled to listen against their will to speakers they did not want to hear. Picketing, though it may be utilized to communicate ideas, is not speech, and therefore is not of itself protected by the First Amendment. Hughes v. Superior Court, 339 U. S. 460, 464-466, 70 S. Ct. 718, 720-722, 94 L. Ed. 985; Giboney v. Empire Storage & Ice Co., 336 U. S. 490, 69 S. Ct. 684, 93 L. Ed. 834; Bakery and Pastry Drivers and Helpers Local 802, etc. v. Wohl, 315 U. S. 769, 775-777, 62 S. Ct. 816, 819-820, 86 L. Ed. 1178 (Douglas, J., concurring)." (85 S. Ct. at page 468.)

There is no question but that subdivision I (1) of the prayer is directly and without equivocation for an injunction to restrain a parade or procession without a permit (R. 36, this brief, ante page 10).

To continue on the question of overbreadth, in the first place, such question is not governed, as appears to be assumed in opposition briefs, by the same strict rules of construction relating to criminal statutes. This is true for the reason that the bill of complaint furnished additional information concerning the nature of the prohibited conduct. In addition, the door of equity is always open to construe any decree it may have rendered, if considered ambiguous, a protective device not available to one who may violate a criminal statute. The person who may ultimately be punished for contempt for violating an injunction need not run the risk of punishment because he may obtain a judicial determination in advance of any act in violation of such injunction.

But we do not believe the injunction in this case was vague or overbroad. For comparison, we turn to some of the federal cases for the scope of injunctions issued. For example, in **In Re Debs**, 158 U. S. 564, 15 S. Ct. 900, 912, the injunction was both sweeping and long in its prohibition. On verified bill of complaint presented to the court a temporary injunction was issued without a hearing commanding the defendant,

> "and all persons combining and conspiring with them, and all other persons whomsoever, absolutely to desist and refrain from in any way or manner interfering with, hindering, obstructing, or stopping any of the business of any of the following named railroads (specifically naming the various roads named in the bill) as common carriers of passengers and freight between or among any states of the United States, . . .". (15 S. Ct. at page 902.)

We quote the remainder in Footnote below.[23]

Debs was convicted of contempt, for violating this injunction. Before leaving **In Re Debs**, we note in the language of Mr. Justice Brewer, which is particularly perti-

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[23] ". . . and from in any way or manner interfering with, hindering, obstructing, or stopping any mail trains, express trains, or other trains, whether freight or passenger, engaged in interstate commerce, or carrying passengers or freight between or among the states; and from in any manner interfering with, hindering, or stopping any trains carrying the mail; and from in any manner interfering with, hindering, obstructing, or stopping any engines, cars, or rolling stock of any of said companies engaged in interstate commerce, or in connection with the carriage of passengers or freight between or among the states; and from in any manner interfering with, injuring, or destroying any of the property of any of said railroads engaged in, or for the purpose of, or in connection with interstate commerce, or the carriage of the mails of the United States, or the transportation of passengers or freight between or among the states; and from entering upon the grounds or premises of any of said railroads for the purpose of interfering with, hindering, obstructing, or stopping any of said mail trains, passenger or freight trains engaged in interstate commerce, or in the transportation of passengers or freight between or among the states, or for the purpose of interfering with, injuring, or destroying any of said property so engaged in or used in connection with interstate commerce, or the transportation of passengers or property between or among the states; and from injuring or destroying any part of the tracks, roadbed, or road or permanent structures of said railroads; and from injuring, destroying, or in any way interfering with any of the signals or switches of any of said railroads; and from displacing or extinguishing any of the signals of any of said railroads; and from spiking, locking, or in any manner fastening any of the switches of any of said railroads; and from uncoupling or in any way hampering or obstructing the control by any of said railroads of any of the cars, engines, or parts of trains of any of said railroads engaged in interstate commerce or in the transportation of passengers or freight between or among the states, or engaged in carrying any of the mails of the United States; and from compelling or inducing, or attempting to compel or induce, by threats, intimidation, persuasion, force, or violence, any of the employes of any of said railroads to refuse or fail to perform any of their duties as employees of any of said railroads in connection with the interstate business or commerce of such railroads or the carriage of the United States mail by such railroads, or the transportation of passengers or property between

nent to the part of the injunction issued in this case to prohibit the inciting, fostering and encouraging the formation of mobs in carrying out the objectives of the "movement", the following at page 912 of 15 S. Ct.:

> "A most earnest and eloquent appeal was made to us in eulogy of the heroic spirit of those who threw up their employment, and gave up their means of earning a livelihood, not in defense of their own rights, but in sympathy for and to assist others

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or among the states; and from compelling or inducing, or attempting to compel or induce, by threats, intimidation, force, or violence any of the employees of any of said railroads who are employed by such railroads, and engaged in its service in the conduct of interstate business or in the operation of any of its trains carrying the mail of the United States, or doing interstate business, or the transportation of passengers and freight between and among the states, to leave the service of such railroads; and from preventing any person whatever, by threats, intimidation, force, or violence from entering the service of any of said railroads, and doing the work thereof, in the carrying of the mails of the United States or the transportation of passengers and freight between or among the states; and from doing any act whatever in furtherance of any conspiracy or combination to restrain either of said railroad companies or receivers in the free and unhindered control and handling of interstate commerce over the lines of said railroads, and of transportation of persons and freight between and among the states; and from ordering, directing, aiding, assisting, or abetting in any manner whatever any person or persons to commit any or either of the acts aforesaid.

'And it is further ordered that the aforesaid injunction and writ of injunction shall be in force and binding upon such of said defendants as are named in said bill from and after the service upon them severally of said writ, by delivering to them severally a copy of said writ, or by reading the same to them, and the service upon them respectively of the writ of subpoena herein, and shall be binding upon said defendants, whose names are alleged to be unknown, from and after the service of such writ upon them respectively, by the reading of the same to them, or by the publication thereof by posting or printing, and, after service of subpoena upon any of said defendants named herein, shall be binding upon said defendants and upon all other persons whatsoever who are not named herein from and after the time when they shall severally have knowledge of the entry of such order and the existence of said injunction'" (15 S. Ct. 902, 903).

whom they believed to be wronged. We yield to none in our admiration of any act of heroism or self-sacrifice, but we may be permitted to add that it is a lesson which cannot be learned too soon or too thoroughly that under this government of and by the people the means of redress of all wrongs are through the courts and at the ballot box, and that no wrong, real or fancied, carries with it legal warrant to invite as a means of redress the co-operation of a mob, with its accompanying acts of violence."

In a situation involving racial demonstrations similar to those involved in this case, the District Court of Baton Rouge, Louisiana, issued a temporary restraining order to prevent irreparable injury, loss and damage and to preserve law and order. The court denied motion to dissolve the temporary restraining order, but stayed further proceedings in such case under the doctrine of abstention to permit the state courts of Louisiana to determine the issues, since the responsibility for preserving public order is essentially that of the State. **Griffon v. Congress of Racial Equality**, 1963, 221 Fed. Supp. 899. Please also see **Congress of Racial Equality v. Clemmons**, 1963 (CA-5), 323 Fed. 2d 54.

The injunction or restraining order in **Griffon** which the trial court refused to dissolve is also very broad.[24]

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[24] Its provisions are that CORE and persons acting in concert with them are: "hereby enjoining from financing, sponsoring, encouraging, or engaging in meetings or any other activities whereby violations of existing state, municipal or federal laws are suggested, advocated or encouraged. . . . .

. . . 'financing, sponsoring, encouraging or engaging in meetings, demonstrations or other activities whereby the public ways, streets, sidewalks or highways of the City of Plaquemine, or of the Parish of Iberville, Louisiana, are blocked, or the unimpaired use thereof denied to other traffic lawfully attempting to use the same.'

. . . 'financing, sponsoring, encouraging or engaging in meetings or other activities wherein or whereby disobedience of the

In **Kelly v. Page**, 1964 (CA-5), 335 Fed. 2d 114, the restraining order was obtained by the City of Albany, Georgia, but the denial of temporary injunction because of changed conditions was appealed to the Fifth Circuit Court of Appeals and remanded by it to the District Court for a full findings of fact and conclusions of law. The restraining order of the District Court issued July 20, 1962, was directed to Rev. Martin Luther King, Reverend Ralph Abernathy, Reverend Wyatt Tee Walker, Southern Christian Leadership Conference and others, including The Albany Movement. It restrained them and those acting in concert or participation with them who receive actual notice of the order by personal service or otherwise,

> . . . "from continuing to sponsor, finance or encourage unlawful picketing in the City of Albany, from engaging or participating in any unlawful congregating or marching in the streets, on the sidewalks, or other public ways of the City of Albany, Georgia, from conspiring, encouraging or participating in any boycott in restraint of trade, or from doing any other act designed to provoke breaches of the peace or from doing any act in violation of the provisions herein referred to." **Asa D. Kelley, Jr., et al. v. M. S. Page, et al.**, in the U. S. District Court Middle Dist. of Ga., Albany Div., No. 727, issued July, 1962 (unreported).

In United States v. U. S. Klans, Knights of Ku Klux Klan, 1961, 194 Fed. Supp. 897, District Judge Johnson

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lawful orders of properly constituted law enforcing agencies and their personnel is advocated, suggested or encouraged.'

. . . 'financing, sponsoring, encouraging or engaging in meetings or any other activities designed or held for the purpose of impeding or obstructing the administration of justice or the orderly functions of government."

. . . 'engaging in any activity designed to or which does impede, hinder or obstruct officers of the law or officials of the Parish of Iberville, Louisiana, or the Town of Plaquemine, Louisiana, from performing and discharging the duties of their respective offices' " (221 Fed. Supp. 901).

issued a sweeping injunction against the Klan, but also issued a restraining order against the Southern Christian Leadership Conference, Ralph D. Abernathy, Martin Luther King, Jr., F. L. Shuttlesworth, Wyatt Tee Walker, and all others acting as their agents, officers or members in or employees of or acting in concert with them enjoining the sponsoring, financing and encouraging of publicized trips of "Freedom Riders" which will foment violence in and around bus terminals and bus facilities.

D.

The evidence is sufficient.

We do not repeat evidence noted in our Statement, ante pages 13-18, and also that contained in petitioners' brief that shows beyond all doubt that the "Movement" was highly organized and all its moves carefully planned and carried out. The chief strategist was petitioner, Wyatt Tee Walker (R. 211), who was in direct charge of the April 12th and April 14th incidents.

Of course, each of the conspirators is responsible for any unlawful act that may result pursuant to the carrying out of the conspiracy. It is not necessary that each be a participant in everything that is done. "A conspirator may join at any point in the progress of the conspiracy and be held responsible for all that may be and all that has been done". Poliafico v. United States, 1956 (C. A. 6), 237 Fed. 2d 97, 104, cert. den. 352 U. S. 1025, 77 S. Ct. 590, 1 L. Ed. 2d 597.

E.

Convictions sustainable on conspiracy charge.

It is not necessary to a conviction for a conspiracy that each of the conspirators shall directly participate in every act in furtherance of its consummation. **Blumenthal v. United States**, 332 U. S. 539, 557, 558, 68 S. Ct. 248, 257.

Conviction for a conspiracy may be sustained whether the purpose is lawful but is consummated by unlawful means or when the purpose is unlawful by any means whether lawful or unlawful. **Duplex Printing Press Co. v. Deering**, 254 U. S. 443, 465, 41 S. Ct. 172, 176, 65 L. Ed. 349, 16 A. L. R. 196.

It matters not how many otherwise unlawful acts may be encompassed within the furtherance of the over-all conspiracy, the criminal offense is one and one punishment alone is properly imposed. **Skelly v. U. S.**, C. C. A., Okl., 76 F. 2d 483, certiorari denied, 55 S. Ct. 914, 295 U. S. 757, 79 L. Ed. 1699; **Berman v. U. S.**, C. C. A. Okl., 76 F. 2d 483, certiorari denied, 55 S. Ct. 914, 295 U. S. 757, 79 L. Ed. 1699.

In this case, the gravamen of the criminal contempt offense charged is violation of the injunction by concerted action of the petitioners in the violation of the injunction. It is immaterial whether some acts committed in furtherance and consummation of the conspiracy to violate the injunction may be lawful, and standing alone, legally protected by Constitutional provisions relating to freedom of speech, assembly or that equal protection of the laws or due process were not afforded with respect to them as so isolated. The point is that the injunction was knowingly violated in at least one of its prohibitions in concert of other and so charged in the petition for rule nisi and that is sufficient to sustain the contempt convictions. **Short v. United States**, 1937 (CCA-4), 91 Fed. 2d 614; **People v. Tavormina**, 1931, 257 N. Y. 184, 177 N. E. 317.

Although this subsection E is made a part of our Argument, Section II, we respectfully request its inclusion with authorities herein cited in consideration of Sections III, IV, and V, as well.

III.

The Constitutionality of 1159.

We have heretofore argued in Section I that the question of constitutionality of 1159 was never reached because the application of the rule of **Mine Workers** and **Howat v. Kansas** does not permit that issue to be reached. We have urged and continue to urge adherence to this rule which places respect for the law as a fundamental foundation stone of our democratic society. An editorial written by an editorial writer for The Dallas Morning Star on October 14, 1966, comments on this case, after saying that the questions are numerous and perplexing:

> "But there is only one issue: Does the individual have the right to flaunt a court order, regardless of whether the order is right or wrong?
>
> There is only one obvious answer. And, church-state relationship aside, God help our system of rule by law if the Court arrives at any other answer."

Please see Appendix hereto, page 85.

In II, we have urged affirmance of the contempt convictions because of the presence of other features of the injunction prohibiting other unlawful conduct engaged in that sustains the contempt convictions aside from such mere violation of ordinance 1159.

We do not recede from the above positions but we now emphasize an additional reason the unlawful conduct of petitioners precludes a consideration of the constitutionality of 1159, even though the convictions should be held to rest upon its violation.

First, the attack is by those who unquestionably violated the ordinance without making any application for a permit required by it. But their standing to make such an attack in such a case is dependent upon their conduct being otherwise lawful. As stated in **Staub v. City of Baxley**, 1958, 355 U. S. 313, 78 S. Ct. 277, 2 L. Ed. 2d

319, where a licensing ordinance was stricken down for failure to contain appropriate standards for issuance thereof, when no attempt was made to obtain such license:

> "It will be noted that appellant was not accused of any act against the peace, good order or dignity of the community, nor for any particular thing she said in soliciting employees of the manufacturing company to join the union. She was simply charged and convicted for 'soliciting members for an organization without a permit.' " 355 U. S. at page 321.

The same case limits the right of attack by one not making application for such a license or permit to an ordinance void on its face.

We respectfully urge that on this point too the petitioners have failed to qualify in their right to urge its unconstitutionality assuming arguendo that all other reasons urged herein precluding such attack are held to be without merit.

Ordinance 1159 does contain standards for the issuance of a parade permit. We recognize that the Court of Appeals of Alabama has said these standards are overbroad. However, it should be noted that question was raised before the Alabama Court of Appeals by one directly charged with its violation simply and no other unlawful acts or conduct were involved in the issues before the Court. Certainly the rule of **Mine Workers** and **Howat v. Kansas** was not involved.

We think the Court of Appeals was wrong in its opinion. Certainly, we do not see any significant distinction between the Birmingham Ordinance standard and those of the NIMLO Model Ordinance approved by the Alabama Court of Appeals. 180 So. 2d pages 129-131.

But it also need be remembered that as petitioners say on page 10 of their brief, this decision is now being re-

viewed on certiorari granted by the Supreme Court of Alabama. That court has not as yet construed the ordinance, but no doubt will do so.

In a 1961 case, the Supreme Court of South Carolina has dealt with the question and we think brought to focus a distinction which the Alabama Court of Appeals apparently overlooked. In **City of Darlington v. Stanley**, 1961, 239 S. C. 139, 122 S. E. 2d 207, that court upheld a parade permit ordinance when the permit was required to be issued by the Mayor or Council, subject to their discretion and, "subject to the public convenience and public welfare".

There is little, if any, actual difference between the standards of the Darlington ordinance and those of 1159, although more words are used in the latter. The Darlington ordinance was upheld on the authority of **Poulos v. State of New Hampshire**, 345 U. S. 395, 73 S. Ct. 760, 768, 97 L. Ed. 1105, 30 ALR 2d 987, and **Cox v. New Hampshire**, 312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049, 133 ALR 1396. Please see 122 SE at pages 211, 212.

The point of the **Darlington** case is that the discretion was not unbridled, but convenience and public welfare necessarily meant such things as safety, proper policing, preventing confusion and minimizing the risk of disorder in the use of the streets. With this construction, the Darlington ordinance was upheld by the South Carolina Supreme Court, just as a similar New Hampshire Statute was upheld after being so construed by that state's highest court. As so construed the statute was held to be constitutional by the Supreme Court of the United States in **Poulos** and **Cox.**

In the light of these cases, it seems logical that 1159 should be properly construed, as in **Darlington, Poulos** and in **Cox** to restrict any unbridled discretion and its use to matters concerning the proper use of the streets in safety,

without confusion, risk of disorder, and with proper regard for policing necessities. We think the Supreme Court of Alabama may well so construe 1159. In **Darlington**, the court applied the rule of law favoring construction of a statute in such a way as to uphold its constitutionality. Obviously, it cannot be construed to be invalid as applied to petitioners. Conduct otherwise unlawful and failure to apply for a permit, and other reasons we have argued herein preclude this.

IV.

Statements and News Release Made by Petitioners Walker, King, Abernathy and Shuttlesworth Cannot Be Isolated From Their Direct Part in the Violation of the Injunction to Stand as Protected Free Speech.

Under their Proposition III (Pet. Br. 71-76), petitioners attempt to isolate evidence of derogatory statements, criticizing the courts of the South and the injunction in this case in particular, from the direct pronouncement of definance and intent to violate the injunction contained therein. The point is made that the petition for show cause order charged these written and oral declarations as a separate offense as to the four petitioners above named, and since the conviction was single their convictions should be reversed; if standing alone, such charges could not be sustained because they conflict with constitutionally protected free speech.

Our answer is two fold. First, the statements and declarations are verbal acts, but when taken into account with other acts constitute evidence of the guilt of not only these four petitioners, but the others as well, of a conspiracy to defy and violate the injunction, which is criminal contempt. The thrust of the charge against all respondents made a party to the show cause petition is that they conspired to defy and violate the injunctive

order in the consummation of which conspiracy certain meeting were held, statements, verbal and written, were made, and other overt acts committed as recited in the petition. The charges were so considered by the trial court. Only one sentence of conviction was imposed. Each respondent found guilty was treated alike; the four who played major roles in the conspiracy were given the same punishment as those who were found guilty of having played minor parts. To say that the trial court must be presumed to have meted out added punishment to the four because of the statements and declarations of which they alone were guilty is to ignore the plain facts disclosed by the trial court's decree. As shown by the Record,[25] the prayer of the petition to show cause was that the four be required to perform in the future an affirmative act of recanting and retracting these declarations, civil contempt. But the trial court refused to do this and restricted the convictions to past conduct only, criminal contempt.

This treatment of the contempt petition by the trial court, considering all respondents equally guilty of the overall conspiracy consisting of a series of acts to flout and violate the injunction in carrying on the "Movement",[26] which respondent King said had reached the

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[25] Please see prayer for relief wherein the petitioners who played major roles in the conspiracy were distinguished from those playing minor roles (R. 89, 90). Petitioners prayer for relief (R. 90) is in pertinent part as follows: ". . . and further why each of said respondents, Wyatt Tee Walker, Ralph Abernathy, F. L. Shuttlesworth and Martin Luther King, Jr., shall not continue to be adjudged in contempt of this court and from time to time punish therefor unless they shall publicly retract or recant the statements made publicly at press conferences and mass meetings on April 11, 1963, of their intention to violate the injunction described in the foregoing petition."

[26] What the "movement" was has never been defined, but the Alabama organization enjoined was the Alabama Christian Movement for Human Rights. That it was an organized,

point of no return (R. 243, 244), is sustained by a number of decisions of this Court and other courts. Included among these are: **Blumenthal v. United States**, 332 U. S., pages 539, 559, 68 Sup. Ct. 248, 257; **United States v. Rosenberg** (C. C. A.-2, 1952), 195 Fed. 2d 583, 600, 601, **cert. denied** 344 U. S. 838, 73 S. Ct. 20, 21, 97 L. Ed. 652, **reh. denied** 344 U. S. 889, 73 S. Ct. 134, 180, 97 L. Ed. 687, **reh. denied** 347 U. S. 1021, 74 S. Ct. 860, 98 L. Ed. 1142, **motion denied** 355 U. S. 860, 78 S. Ct. 91 L. Ed. 2d 67; **People v. McCrea**, 6 N. W. 2d 489, 303 Mich. 213, **cert. denied** 318 U. S. 783, 63 S. Ct. 851, 87 L. Ed. 1150.

Each of the conspirators is guilty in equal degree for "all that may be or has been done", whether he entered the conspiracy at the beginning or later. **Poliafico v. United States**, 237 Fed. 2d 97, 104 (C. C. A.-6, 1956); **cert. den.** 352 U. S. 1025, 77 S. Ct. 590, 1 L. Ed. 2d 597.

It is of no moment that the unlawful conspiracy was in part consummated by the spoken and written word. An unlawful act, including as a component element thereof the use of written or oral words, gains no constitutional protection as to freedom of speech or press. This was made clear in **Giboney v. Empire Ice and Storage Company**, 336 U. S. 490, 502, 69 S. Ct. 684, 691, 93 L. Ed. 834, where the court said:

> "It has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language either spoken, written or printed."

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planned, sustained program in which publicity of all kinds for money raising and other purposes was an integral part is clear. Without doubt, the defiant news release and other like declarations were intended, along with other overt acts exploiting defiance and violation in furtherance of these purposes in the area of nation-wide publicity of the "Movement", for such money raising and possibly other purposes.

Second, the declarations, written or verbal, even if standing alone, are more than mere speech. They do more than merely criticize the court for issuance of the injunction. Even aside from any further involvement of these men in the chain of events that followed, and even if the conspiracy charge had not been made against them, it is clear that their joint declarations encouraging and inciting the violation of the injunction by the other members of S. C. L. C. and A. C. M. H. R. were more than free speech. They partake more of the nature of "verbal acts".[27]

As has been held in **Fox v. Washington**, 326 U. S. 273, 35 S. Ct. 383, 59 L. Ed. 573, a man may be punished for encouraging the commission of a crime.

We have read the decisions of this Court cited by petitioners. None of them involved a direct threat to defy and violate, encouraging and inciting the violation of an injunction or restraining order by the leaders of an enjoined organization, resulting in its violation. Consequently, they are distinguishable from the instant case.

In re Sawyer, 360 U. S. 622, 629, 79 S. Ct. 1376, 1379, presented the question, "Did post trial speech of lawyer impugn the integrity of the U. S. District Court Judge or reflect upon his impartiality?" This Court in considering the notes of the news reporter made on the speech held it did not. A majority of the court, composed of Mr. Justice Frankfurter, Mr. Justice Clark, Mr. Justice Harlan and Mr. Justice Whittaker, dissenting, together with Mr. Justice Stewart, concurring, held that criticism of a trial judge by a lawyer while engaged in a pending case, if made with the intent to obstruct justice, is not protected free speech. It is logical that such conduct by

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[27] **Gompers v. Buck's Stove and Range Co.**, 221 U. S. 418, 31 S. Ct. 492, 497, uses this expression in speaking of words used, "unfair" or "we don't patronize", in relation to a boycott.

a party to pending litigation would likewise be unprotected.

In **Wood v. Georgia**, 375 U. S. 375, 386, 82 S. Ct. 1364, 1372, the contempt citation was for criticizing a grand jury charge to investigate possible evils resulting from a bloc vote. The sheriff, who expected to soon be up for election, was the defendant. Mr. Chief Justice Warren noted the fact that no individual was on trial and no jury involved. He made this pertinent distinction:

> "And, of course, the limitations of free speech assume a different proportion when expression is directed toward a trial as compared to a grand jury investigation." 375 U. S., at pages 389, 390.

Bridges v. California, 314 U. S. 252, concerns contempt convictions for newspaper editorials and a telegram sent by Bridges to the Secretary of Labor. Mr. Justice Black, writing for the majority of five justices, made it clear that Bridges' telegram, which stated a strike would result if the California court decree should be enforced, was not a threat to violate the court order:

> "It is not claimed that such a strike would have been in violation of the terms of the decree, nor that in any other way it would run afoul of the law of California. On no construction, therefore, can the telegram be taken as a threat either by Bridges or the union to follow an illegal course of action.
>
> "Moreover, this statement was made to the Secretary of Labor, who is charged with duties in connection with prevention of strikes." 314 U. S., at page 277.

Please contrast the defiant declarations of intention to violate the court order in the instant case, made and repeated at meetings clearly designed to encourage and incite the organizations, S. C. L. C. and A. C. M. H. R., and their members, to violate the court order.

Pennekamp v. Florida, 328 U. S. 331, 66 S. Ct. 1029, had to do with editorials in a Miami newspaper. This involved no threat by a party to violate a court order, or as it was expressed, to interrupt the orderly processes of the court. Such interruption is stated to be a proper test in balancing freedom of expression against improper interference with the orderly administration of justice. 328 U. S., at page 336. Please note the extreme contrast in this respect between **Pennekamp** and the instant case.

Craig v. Harney, 331 U. S. 367, 67 S. Ct. 1249, concerned criticism of the action of a state trial judge in newspaper stories and an editorial. No threat nor overt act to disobey a court order resulted. The case is entirely dissimilar.

Two other cases cited by petitioners, **Garrison v. Louisiana**, 379 U. S. 64, 85 S. Ct. 209, and **New York Times v. Sullivan**, 376 U. S. 254, 84 S. Ct. 710, are not pertinent. They deal with libel, criminal and civil.

"When a case is finished, courts are subject to the same criticism as other people; but the propriety and necessity of preventing interference with the course of justice by premature statement, argument or **intimidation** hardly can be denied (emphasis ours)." **Patterson v. Colorado**, 205 U. S. 454, 27 S. Ct. 556, 558.

Thomas v. Collins, 323 U. S. 516, 529; **Stromberg v. California**, 283 U. S. 359, 367-368; **Williams v. North Carolina**, 317 U. S. 287, 291, 293; and **Terminiello v. Chicago**, 337 U. S. 1, do not enunciate any principle which is applicable to this case. Here, the conviction was for having consummated a conspiracy to violate the injunction and the written and spoken words used were not constitutionally protected because they were specific calls to action of an unlawful nature. The case of **Holt v. Virginia**, 381 U. S. 131, 85 S. Ct. 1375, is certainly not remotely applicable. There the lawyer was adjudged in direct contempt of

court because of having filed a motion for change of venue.

The declarations in defiance and threats of violation, accompanied by open encouragement and incitement to violation of the injunction, of which the four petitioners were guilty, cannot be justified as protected free speech by any decision mentioned by petitioners or, for that matter, by any other decision or authority that we have been able to find.

V.

The Conviction of Petitioners Hayes and Fisher Is Sustained by the Evidence.

These petitioners urge that their convictions should be overturned because of lack of evidence that they had knowledge or notice of the injunction terms. Both were active members of A. C. M. H. R., Hayes for six years (R. 333) and Fisher for four years (R. 300).

Both of them were attendants at the meetings held prior to the Sunday, April 14th, parade or procession, in which they both took part. Both attended the meeting of Saturday, April 13th. At this meeting volunteers were recruited for the parade or procession to be held the next afternoon, and for volunteers to go to jail. Also, volunteers were solicited to call all the Negroes in the community to get them out the next day for this "demonstration".[28]

Petitioner Hayes admitted to Detective Jones that he was with the leaders in the Sunday, April 14th march, and

[28] In Hayes' testimony it was referred to as a "demonstration". This witness said he had heard earlier that demonstrators had been enjoined. He said he had made up his mind that he would take part in it and he went for that purpose (R. 336, 337).

that he knew of the injunction and was just marching in the face of it anyway (R. 256, 257).

Respondent Fisher admitted he attended both the meetings held on Saturday night and "that held on Friday night as well" (R. 300, 301).

It was the Friday meeting when petitioner Walker made his call for Negroes willing "to die for me". He also made a call for students, grades one through graduate school. At this and all meetings volunteers to go to jail were called for. Fisher stated volunteers "to walk" were called for at the Saturday, April 13th meeting. They were to walk the next day, April 14th (R. 301).

He admitted he knew about the injunction (R. 354); that it was interpreted to him that if he participated in the April 14th demonstration he would have to go to jail (R. 304, 305).

As the Supreme Court of Alabama stated in affirming the judgment against them:

> "We think it would require of the trial court an unduly naive credulity to declare that the court erred in concluding that Hayes and Fisher had knowledge that marching on the streets was enjoined and that they knowingly and deliberately violated the injunction by marching or parading on Sunday" (R. 446).

The doctrine of **Thompson v. Louisville**, 362 U. S. 199, and **Fields v. City of Fairfield**, 375 U. S. 248, is not applicable.

Of course, it is only in the event of a complete lack of evidence that this Honorable Court will invoke the right to examine the record and make its independent determination on any question of fact. **Whitney v. California**, 274 U. S. 357, 47 S. Ct. 641, 71 L. Ed. 594; **Milk Wagon**

Drivers Union v. Meadowmoor Dairies, 312 U. S. 287, 61 S. Ct. 552, 85 L. Ed. 836; **Portland R. L. & P. Co. v. Railroad Commission**, 229 U. S. 414, 33 S. Ct. 827, 57 L. Ed. 1248. We submit that the evidence and inferences to be drawn therefrom are adequately sufficient, especially in view of the fact that it comes to this Honorable Court with a favorable presumption on the facts determined by the Alabama Supreme Court.

CONCLUSION.

It is respectfully submitted that judgments of conviction should be affirmed.

Respectfully submitted,

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APPENDIX.